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MICHAEL RODAK, JR.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-375

SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC.

and

NEWSPAPER & PERIODICAL DRIVERS' & HELPERS' UNION LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

DOUGLAS BROWN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 12, 1972.[1]

[1]The names of all the respondent newspaper dealers are as follows: Douglas Brown, Walter DeLong, Phillip T. Walker, Marvin W. Weissensee, Kenneth C. Wollman, John Roy Conway, Leroy Lester Holbrook, Darrell E. Baker and Willis P. Kolb.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1-14) is reported at ..... F.2d ..... The decision and order of the National Labor Relations Board ("Board") (Appendix B, *infra*, pp. 15-62) are reported at 194 N.L.R.B. 4.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This case involves a direct and important conflict between the decision of the Ninth Circuit and the recent decision of the Second Circuit in *The Herald Company v. N.L.R.B.*, 444 F.2d 430 (2nd Cir. 1971), *cert. denied*, 404 U.S. 990 (1971). The questions presented are whether certain newspaper dealers are "employees" instead of "independent contractors" within the meaning of Section 2(3) of the National Labor Relations Act, as amended ("Act"), and whether the Court of Appeals exceeded the bounds of judicial review in overturning a determination by the Board that the dealers are in fact "employees".

STATUTE INVOLVED

The pertinent provisions of the Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth in Appendix C, *infra*, p. 63.

STATEMENT OF THE CASE

A. Introduction

The San Francisco Newspaper Printing Company, Inc. (the "Company") performs the printing, circulation, advertising, accounting, credit and collection functions for the *San Francisco Chronicle*, the *San Francisco Examiner* and the *Sunday Examiner and Chronicle* (App. B. 25). On March 22, 1968, the Company and the Newspaper & Periodical Drivers' and Helpers' Union, Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the "Union") entered into a Supplemental Agreement. This contract provided that on specified dates various Company newspaper dealerships would come within the Union's jurisdiction and that the dealer servicing the dealership would be terminated but could, at the Company's option, continue to work in the same territory under the Union's jurisdiction. The Supplemental Agreement affected thirty-seven of the Company's Northern California dealers in Marin and Santa Clara Counties (App. A. 2, App. B. 27-30).

B. Legal Proceedings

In March, June and August of 1970, nine dealers filed unfair labor practice charges against the Company and the Union with the Board. The dealers alleged that the Supplemental Agreement violated Section 8(e) of the Act as an agreement between a company and a union to cease doing business with independent third parties (App. B. 24-25). An unfair labor practice complaint was issued against the Company and Union; further implementation of the Supplemental Agreement was blocked by the issuance of a temporary injunction under Section 10(1) of the Act.

The Company and the Union defended against the complaint on the grounds that the dealers are "employees" of

the Company instead of "independent contractors". After an extensive hearing, the Trial Examiner held that the dealers are "employees". On November 8, 1971, the Board agreed and ordered the unfair labor practice complaint dismissed on the ground that Section 8(e) of the Act does not govern the relationship between an employer and its employees. *Minnesota Milk Company v. N.L.R.B.*, 314 F.2d 761, 764 (8th Cir. 1963).

The dealers petitioned the Ninth Circuit for judicial review under Section 10(f) of the Act on November 9, 1971, and the temporary injunction was dissolved on November 30, 1971. The Court of Appeals reversed the Board's decision on the issue of "employee" status by holding that the dealers are independent contractors. It remanded the matter to the Board for determination of whether the Supplemental Agreement has the objective of primary work preservation for the Union and is therefore valid under Section 8(e) of the Act.

C. The Issue of Employee Status

The Company has created various exclusively defined newspaper dealerships in Northern California and hires individuals to service these territories. The Company transports papers to each dealership at its own expense and sells them to the dealer at wholesale. Under the Company's supervision the dealer then resells the newspapers to Company customers primarily through home delivery and coin operated racks (App. B. 37-38).

The facts on the issue of "employee" status are simple and almost wholly uncontested.

A number of facts point to independent contractor status. The dealer's contract labels him an independent contractor and states that the Company will not exercise control over his work (Dealer's Exh. No. 2, Art. III, Par. 2, Art. I, Par.

3). The dealer's compensation mainly consists of the difference between the wholesale rate at which he buys papers and the retail rate at which he sells them, and the Company does not carry the dealer on its payroll (App. B. 38, 42; Tr. pp. 689A-689B, 460). Nor does the Company make social security, withholding tax or unemployment insurance deductions for the dealer or pay fringe benefits to him such as health and welfare coverage, paid vacations, overtime compensation or pension or retirement benefits (App. B. 38; Tr. p. 460). The Company does not reimburse the dealer for his daily expenses or losses (App. B. 49; Tr. pp. 689A-689B).

The dealer is allowed to hire and pay drivers and other help and he agrees to furnish a substitute if he becomes ill, etc. (App. B. 47; Tr. pp. 461-462; Dealers' Exh. No. 2, Art. II, Par. 7). Further, the dealer owns his delivery vehicle and owns or rents other equipment such as newspaper racks and operating supplies (App. B. 41; Tr. pp. 836, 473-474). The dealer has considerable discretion in determining the number of papers to be purchased from the Company (App. B. 38; Tr. p. 1396). He also has great latitude in fixing his daily work schedule (App. B. 43-44; Tr. pp. 46, 481, 768).

Some dealers engage in outside part-time work (App. B. 39; Tr. pp. 79, 355, 481, 509, 996, 275, 283-284). The dealer may also sell competing newspapers but only two of the thirty-seven dealers do so and their sales are extremely limited (App. B. 39; Tr. pp. 913-914, 1745). The dealer performs his own bookkeeping and billing and can refuse service to customers who are inaccessible or a credit risk (App. B. 39; Tr. pp. 347-350, 168, 525, 1660, 1484-1485). Moreover, the dealer carries his own liability insurance (App. B. 53; Dealers' Exh. No. 2, Art. III, Par. 2).

However, a large number of facts point to employee status. The dealer works under the jurisdiction of the Com-

pany's circulation department. The Company owns the business which the dealer is hired to service; the dealer has no proprietary interest and does not purchase or own the dealership or its "good will". The dealer by contract agrees that his right to service the business cannot be assigned or sold and no dealer has ever assigned or sold this right. The Company requires the dealer upon termination to turn over the subscriber lists to the incoming dealer hired by the Company and a Company supervisor oversees and controls the entire transaction (App. B. 47; Tr. pp. 108, 266, 505, 625-626, 695, 707, 1021-1022, 2047-2049; Dealers' Exh. No. 2, Art. III, Par. 11, Art. II, Par. 5). The Company also unilaterally establishes the size of its dealerships and has frequently split or combined them (App. B. 58; Tr. pp. 462-464, 1373-1375, 1313-1314, 1336-1337, 1640).

The dealer is free to determine his retail rate pending the outcome of retail price maintenance litigation brought against the Company (App. B. 31-33; Tr. pp. 458-459; Dealers' Exh. No. 48; Tr. pp. 2000, 1995). However, the dealers have adhered to the Company's suggested retail rate almost without exception; only three of the thirty-seven dealers have sold at above the suggested retail rate (App. B. 37, 58; Tr. pp. 343, 283-286, 1744-1745). The Company establishes the wholesale newspaper rate which is not uniform and lowers this rate to individual dealers as a means of subsidizing them (App. B. 58; Tr. pp. 911-912). One dealer admitted that the Company would "fix" the wholesale rate so that he "would make a fair profit" (Tr. p. 689B). Another dealer is given "controlled accounts" in which the Company delivers papers for him without charge and his wholesale rate is not increased as to these papers (Tr. pp. 811-812). There was no evidence that any dealer by skill or initiative has amassed greater earnings or has, by his improvidence, suffered financial setbacks.

In addition, the Company grants extracontractual payments and subsidies to the dealers. The Company pays dealer allowances of approximately $300 to $400 per month to its dealers in Santa Clara County, where it faces vigorous competition from other newspapers (App. B. 52-53; Tr. pp. 912, 1422-1424, 2016-2017). The Company also paid each dealer a strike subsidy of approximately $1,200 to $1,400 following a 53 day newspaper strike in 1968 and offered the dealer a strike loan of $400 despite the fact that it had no income during that period (App. B. 52-53; Tr. pp. 125, 271, 498, 604, 708, 744, 918, 1049, 1222-1223, 1226). Further, the Company paid approximately 75% of the operating costs of the Marin County answering service, thus subsidizing each dealer using the service by more than $100 per month (App. B. 40; Tr. p. 2021). This service was provided to Santa Clara County dealers without charge (Tr. pp. 903, 1024). These extracontractual payments and subsidies are important elements of the dealer's income and are entirely within the Company's discretion.

The Company establishes fixed times for pickup and delivery of the newspapers. Thus, the Company requires that the morning paper be delivered by 6:30 a.m. on weekdays and by 7:30 a.m. during weekends (App. B. 37; Tr. pp. 268, 116, 117, 258-259, 390, 544, 578, 837). The Company also requires the dealer to fold the newspaper in a specified manner or if it comes assembled, to deliver it as assembled (App. B. 41-42; Tr. pp. 2026-2028). The Company requires the dealer to make inserts of advertisements in the newspapers (App. B. 51; Company's Exh. Nos. 20(g), 27(i); Tr. pp. 820).

The Company requires the dealer to promote circulation and pays for almost the entire subscription building effort by supplying to the dealer free sample newspapers and sampling cards; telephone solicitation of prospective

subscribers; canvassing crews; premiums offered to new subscribers such as alarm clocks and steak knives; bonuses of $1.50 paid to the dealer for each new subscription obtained by sampling; telephone verification at Company expense of all new orders; and free postcards to be used by subscribers to report whether subscriptions have been properly started (App. B. 48-49; Dealers' Exh. No. 2, Art. II, Par. 6; Tr. pp. 115-116, 269-270, 376, 394-396, 442-443, 526-527, 620, 687-689, 737, 754B, 810, 836, 997). The Company also holds promotion contests and awards prizes such as trips to Las Vegas and $100 checks; the dealer is able to win by using these free subscription building materials (App. B. 49; Tr. pp. 443-444, 527, 836).

The dealer is required by contract to furnish the Company, upon demand, with all records and information, including a complete subscriber list (App. B. 47-48; Charging Parties' Exh. No. 2, Art. II, Par. 5); the Company receives and retains every day complete records of names and addresses of new subscribers and of individuals discontinuing subscriptions (Company's Exh. Nos. 6(a-s), 12(a-oo), 18(a-vv), 20(a-xx), 22(a-v)). The Company can terminate the dealer immediately for cause and many dealers have been terminated for poor performance (App. B. 39, 44-47, 59-60; Tr. pp. 1709-1714). The dealer's contract is long in duration, not short term, and the dealership is a necessary part of the Company's business operations (App. B. 39; Tr. pp. 126, 1444).

The dealer is not required to purchase supplies from the Company but, in fact, he buys almost all of his equipment from the Company once he begins servicing the dealership. The dealer is subsidized because most of these supplies are sold to him at below cost to the Company (App. B. 41; Tr. pp. 69-70, 109-110, 223-224, 278, 351-352, 475, 583, 612-613, 678, 766, 795, 848-849, 869-870, 904-905, 951-

952, 1029, 1167). The Company also provides many items to the dealer free of charge such as open-ended newspaper delivery tubes similar to small mail boxes, decals for newspaper racks, customer account cards and small newspaper racks for use inside stores (Tr. pp. 69, 729, 844, 919, 936).

The Company accepts for credit returns from the dealer of unsold newspapers incident to Company-directed increases in his newspaper draw (App. B. 38; Tr. pp. 1214, 1231, 519-520, 709). The Company also gives credit for unsold Sunday newspapers in excess of 8% of the dealer's draw (App. B. 38; Tr. p. 1214). The dealer has no discretion in the matter, but is required by the Company to post bond to insure the performance of his financial obligations to the Company (App. B. 42; Tr. pp. 615-616).

The Company employs dealer supervisors who work directly in the field supervising the dealers and overseeing customer complaints. Each day the dealers were required to telephone the Company answering service to learn of subscriber complaints at exactly 8:00 and 10:00 a.m. and once in the afternoon (App. B. 40; Tr. pp. 127, 290, 406, 533, 619, 711, 839, 1749-1750). The precise times of all such calls, as well as the exact numbers of customer complaints and stops and starts received by each dealer, were reviewed and logged every day by the Company on master sheets (App. B. 40; Tr. pp. 1668, 1749-1750; Company's Exh. No. 25). Additionally, the Marin supervisor reviews the number of complaints received every day by each of his dealers, and prepares a comparative tally—a "derby" sheet—showing how each dealer ranks in terms of complaints per month with other dealers (App. B. 48; Tr. p. 1670; Company's Exh. No. 26). The supervisor regularly discusses the "derby" sheet with the dealers and they are acutely aware of where they rank with each other in the

"derby" competition (App. B. 48; Tr. pp. 128, 290, 319-320, 442, 535, 851).

Customer complaints were received by the Company and transcribed along with the subscriber's name and address onto triplicated "memos", one copy of which went to the dealer and another to the supervisor (App. B. 51; Tr. pp. 1683, 1784, 129-130, 1617-1618). Hundreds of "aggravated"[2] complaints are registered against the dealers each month (Tr. pp. 301, 487, 534, 1961-1962). The complaints concern each and every aspect of the dealer's work, including such problems as wet papers, late delivery, no delivery, delivery in improper place, improper start of delivery, driver problems—noise, etc., billing and collection problems and failure to make inserts (App. B. 51-52; Company's Exh. Nos. 6(a-s), 10(a-v), 12(a-oo), 14(a-yy), 16(a-gg), 18(a-vv), 20(a-x), 22(a-v), 27(a-i)).

The Company requires the dealer to adjust the complaint in accordance with the Company's rules and its written directions placed on the "memo", and the Marin supervisor reviews and discusses *all* "aggravated" complaints at a required weekly meeting with the dealer (App. B. 51; Tr. pp. 1620, 1748-1749). The supervisor then inscribes on the face of the "memo" whether or not the complaint has been correctly resolved. On four or five occasions irate subscribers have written to seek direct relief from top management officials, and the Company has replied that the dealer is an independent contractor and that delivery problems can only be adjusted at the dealer-supervisor level. However, these few "aggravated" complaints as well as all other "aggravated" complaints are thoroughly investigated and policed by the supervisor and

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[2] "Aggravated" complaints are those persisting for more than one day (App. B. 51; Tr. p. 1618).

his telephone answering service staff (App. B. 59; Tr. pp. 1108, 1111; Company's Exh. No. 24).

The Company also recommends discipline for the dealer's drivers and carrier boys over whom the supervisors maintain daily surveillance by means of the receipt, review and follow-up of complaint "memos" (Company's Exh. Nos. 27(i) and 6(j)). The supervisor telephones the dealer whenever a problem requires immediate attention (Tr. pp. 1725, 1734); he also often talks about the complaint with the subscriber prior to its resolution (Tr. p. 1727). After adjustment of the "aggravated" complaint by the dealer, the Marin answering service telephones *each* subscriber to recheck whether the complaint has been properly resolved (App. B. 52; Tr. p. 1676). The fact that the complaint has been correctly resolved is transcribed, for a second time, by the answering service onto the "memo" which is then placed in the dealer's personnel file. The Marin supervisor controls his dealers by means of suggestions and advice rather than by direct orders, and in most cases his suggestions are followed (Tr. pp. 1630-1631). The Santa Clara supervisor also reviews and discusses *all* "aggravated" complaints with the dealer and often telephones subscribers directly concerning such complaints (Tr. pp. 1748-1749, 1768).[3]

REASONS FOR GRANTING THE WRIT

A. There is a Direct Conflict between the Circuits

The decision of the Ninth Circuit is in direct conflict with the recent decision of the Second Circuit on virtually identical facts in *The Herald Company v. N.L.R.B.*, 444 F.2d

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[3]This supervisor meets his dealers at least twice a month and maintains weekly telephone contact (Tr. pp. 1740-1741, 1756), holding fewer meetings than the Marin supervisor because of the larger size of this territory (Tr. pp. 1759-1760).

430 (2nd Cir. 1971), *cert. denied*, 404 U.S. 990 (1971). In that case, the Court of Appeals enforced a decision of the Board (reported at 181 N.L.R.B. 421) that certain newspaper dealers are "employees" of the Herald Company and not "independent contractors" within the meaning of Section 2(3) of the Act.

The facts confronting the Second Circuit were as follows. The Herald Company publishes and sells two daily newspapers and one Sunday newspaper in Syracuse, New York, and has created a large number of exclusively defined newspaper dealerships in that territory (444 F.2d at 432-433). It transports papers to each dealership at its own expense and sells them to the dealer at wholesale and he then resells them under the Company's supervision (444 F.2d at 432; 181 N.L.R.B. at 448). The customers are primarily home delivery subscribers (181 N.L.R.B. at 448).

The independent contractor indicia in *The Herald Company* case are almost exactly the same as those in the case decided by the Ninth Circuit.

The dealer's contract states that he "occupies, at all times, the position of independent contractor", that he controls "all ways and means relating to the proper performance and completion of the contract" and that he has "exclusive control" over "the means and methods of collection, delivery and distribution of the newspaper" (444 F.2d at 433; 181 N.L.R.B. at 449). The dealer's income "consists primarily of the difference between the wholesale . . . and the resale rate . . ." and he is not on the Company's payroll (444 F.2d at 433). The Herald Company does not make social security, withholding tax or workmen's compensation deductions for the dealer or pay vacation, holiday or other fringe benefits to him (444 F.2d at 433; 181 N.L.R.B. at 452). Nor does the Company reimburse the dealer for his daily expenses or losses (444 F.2d at 433; 181 N.L.R.B. at 449).

The dealer's "personal performance of the . . . contractual obligation is not required" and he is "free to . . . select delivery boys to work on the routes" and to "hire substitutes" (444 F.2d at 433). The dealer also provides "motor vehicles and other equipment" at his "own expense" (444 F.2d at 433). Further, the dealer, instead of the Company, determines his draw of newspapers (Company's Brief to Court of Appeals, pp. 16-17). The dealer has "considerable latitude in planning" his "own work" schedule (444 F.2d at 433).

Dealers "hold other jobs" in addition to the dealership work (444 F.2d at 433). Moreover, dealers "distribute other newspapers along with The Herald's papers" (444 F.2d at 433) and have "acted in competition with the Company" (444 F.2d at 433). The dealer is "responsible" for "his own bookkeeping" and billing; the Company does not require the dealers "to keep any special type record nor does it audit their books" (181 N.L.R.B. at 452; 444 F.2d at 433). Moreover, the dealer decides "whether or not to extend credit to . . . customers" and bears "the risk of nonpayment" (444 F.2d at 433). The dealer purchases his own "accident insurance" (444 F.2d at 433). The Company does not accept returns for credit from dealers with home delivery subscribers (Herald Company's Brief to Court of Appeals, p. 17).

In addition, the dealer owns the "franchise" and has the right to sell it "subject to The Herald's right to purchase within 30 days at the same price" (444 F.2d at 433). Dealerships have been sold in the $10,000 to $17,000 price range and some have even been bequeathed to surviving spouses (444 F.2d at 433).

The employee status indicia in *The Herald Company* case are also very similar to those in the case decided by the Ninth Circuit.

The dealer works under the jurisdiction of the Company's circulation department (181 N.L.R.B. at 448). The Herald Company unilaterally establishes the size of the dealership and has split and adjusted these sizes (Board's Brief to Court of Appeals, p. 9). The Company has exercised controls over the retail newspaper rate, but the record shows that:

> "some of the distributors have for several years charged . . . a resale rate higher than established . . ." (181 N.L.R.B. at 450).

Indeed, The Herald Company made an offer of proof to the Board that it "no longer even suggests a resale rate" to the dealers (Company's Brief to Court of Appeals, p. 39). The Company sets the wholesale rate according to a sliding scale which takes into account the dealer's draw so that the dealer will make a fair profit (444 F.2d at 434). The wholesale rate is not uniform and the Company will lower it for individual dealers as a means of subsidizing them (181 N.L.R.B. at 450-452). There was no evidence that any dealer by skill or initiative has amassed greater earnings or has, by his improvidence, suffered financial setbacks.

In addition, the Company "frequently awards bonuses and subsidies" to the dealer. These "extracontractual payments are an important part" of the dealer's income and are "entirely within" the Company's "discretion" (444 F.2d at 434 and 435).

The Herald Company also "draws up a schedule for the pickup and delivery of the newspapers" (444 F.2d at 434). The record does not disclose whether the newspapers are folded or whether the Company imposes a folding requirement on the dealer. The Company requires the dealer to make inserts of advertisements in the newspaper (181 N.L.R.B. at 449; Board's Brief to Court of Appeals, p. 17).

The Company encourages the dealer to promote circulation and pays for the bulk of the subscription building in the dealership. It utilizes "telephone solicitors, who solicit subscriptions over the phone", runs "numerous promotional contests", employs "canvassers" at times to work in the dealer's territory and compensates the dealer for successful promotion efforts (181 N.L.R.B. at 448; 444 F.2d at 434).

The Herald Company requires the dealer to submit customer lists to it twice a year "solely for the use of the Audit Bureau of Circulation" (Company's Reply Brief to Court of Appeals, p. 18). The Company has also "frequently terminated distributorships at its own initiative" (444 F.2d at 435)—presumably for poor service. Further, the dealer's contract is long in duration, not short term, and the dealership is a necessary part of the Company's business operations (181 N.L.R.B. at 449).

The Herald Company offers to sell supplies to the dealer, but there is no requirement that the dealer purchase from the Company (Company's Brief to Court of Appeals, p. 13). The dealer has no discretion in the matter, but is required to post a bond to insure his financial obligations to the Company (181 N.L.R.B. at 449).

Although it does not appear that the Company supervisors hold weekly meetings with the dealers, the supervisors "investigate delivery problems and participate in their resolution" (444 F.2d at 434). Subscriber "complaints are often directed to the circulation department rather than to the distributors. When the department receives a complaint, it notifies the distributor and requires that he investigate it" (444 F.2d at 434). The complaint is transcribed onto "a form which lists the customer's name and address and the nature of the complaint" (181 N.L.R.B. at 451); the complaints usually concern such matters as "a customer not receiving the paper or the failing to start the delivery of the paper to a new subscriber" (181 N.L.R.B. at 451). The

supervisors also "sometimes contact subscribers to determine whether or not distributors have been following company instructions" (444 F.2d at 434). However, the Company often simply refers complaints to the dealer directly (Board's Brief to Court of Appeals, p. 10). At times the Company will deliver the paper to a subscriber complaining of non-delivery, and will charge the dealer $0.25 for his failure to make the delivery (444 F.2d 434). The Herald Company "regularly communicates" with the dealers concerning "complaint handling as well as other matters such as stop and start orders, inserts, and supplements to the newspapers". It obtains the names and addresses of the dealers' carrier boys and "inundates" the dealers with "instruction letters, telephone calls, and requests for office meetings" (444 F.2d at 434). However, the Company's messages to the dealers "have been ignored" by the dealers "as often, if not oftener, than they have been followed . . . the Company has never tried to enforce its suggestions" (Company's Brief to Court of Appeals, p. 21). The Regional Director commented on this fact as follows: "It is immaterial if the control is exercised by suggestion and request rather than by direct orders and is directed toward cooperative assistance . . ." (181 N.L.R.B. at 452).

Petitioners submit that the decisions of the Ninth and Second Circuits are in direct conflict and that this Court should grant certiorari. Indeed, the only significant fact which distinguishes the two cases is that dealers of The Herald Company buy and enjoy a proprietary interest in the dealership and can sell it as their business asset whereas the Printing Company dealers do *not* buy the dealership, enjoy *no* proprietary interest and *cannot* sell the dealership. However, this fact obviously renders the Printing Company's case a stronger one for employee status than that faced by The Herald Company and, accordingly, this factual

difference serves to increase rather than diminish the conflict between the Ninth and Second Circuits.

Further, as indicated by this Court in *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 255-256 (1968), the question of "employee" status is a highly important issue because it governs the scope of coverage of the Act. Indeed, the issue of "employee" status affects not only newspaper dealers but also a myriad of other workers such as salesmen and various delivery and collection agents who are employed in situations where, despite some indicia of independent contractor status, their work is tightly controlled by their respective employers. Moreover, as will be seen in Section B hereof, increasingly large numbers of "employee" newspaper dealer cases have arisen under the Act since 1960. Thus, petitioners submit that the subject matter of this controversy is sufficiently important in and of itself to merit a full review by this Court.

B. The Ninth Circuit Exceeded the Proper Bounds of Judicial Review

Certiorari should also be granted because the Ninth Circuit grossly exceeded the proper limits of judicial review, as set forth by this Court in *N. L. R. B. v. United Insurance Co., supra.* In reversing the refusal of a Court of Appeals to enforce a Board finding of "employee" status under Section 2(3) of the Act, this Court held that the Board's decision must be enforced if it represents a "choice between two fairly conflicting views"; the Court of Appeals cannot deny enforcement "just because a court would, as an original matter, decide the case the other way" (390 U.S. at 260). Petitioners respectfully submit that this is exactly what was accomplished by the Ninth Circuit in its decision, to wit, a trial *de novo*, in total disregard of this Court's holding in *N.L.R.B. v. United Insurance Co., supra.*

Since 1960 there have been eighteen newspaper dealer cases involving the issue of "employee" status under Section 2(3) of the Act. In fourteen of the cases, the dealers have been held "employees".[4] In only four of the eighteen cases have the dealers been held "independent contractors".[5]

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[4]1. *The Herald Company et al. v. N.L.R.B.*, 444 F.2d 430 (2nd Cir. 1971), *cert. denied*, 404 U.S. 990 (1971);

2. *Beacon Journal Publishing Co.*, 188 NLRB 23, 76 LRRM 1228 (1971);

3. *News-Journal Co. v. N.L.R.B.*, 447 F.2d 65 (3rd Cir. 1971);

4. *N.L.R.B. v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969);

5. *San Antonio Light Division, The Hearst Corporation*, 174 NLRB 97, 70 LRRM 1252 (1969);

6. *San Antonio Light Division, The Hearst Corporation*, 167 NLRB 99, 66 LRRM 1131 (1967);

7. *News Syndicate Co., Inc.*, 164 NLRB 69, 65 LRRM 1104 (1967);

8. *El Mundo, Inc.*, 167 NLRB 107, 66 LRRM 1152 (1967);

9. *The Sacramento Union*, 160 NLRB 117, 63 LRRM 1161 (1965);

10. *Eureka Newspapers, Inc.*, 154 NLRB 102, 60 LRRM 1118 (1965);

11. *Vindicator Printing Company*, 146 NLRB 106, 55 LRRM 1429 (1964);

12. *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (5th Cir. 1963);

13. *San Antonio Light Division, Hearst Consolidated Publications*, 130 NLRB 83, 47 LRRM 1357 (1961);

14. *Buffalo Courier-Express, Inc.*, 129 NLRB 112, 47 LRRM 1100 (1960).

[5]1. *Scripps Company as Publisher of the Cincinnati Post & Times Star*, (9-RC-5798) (1971) (discussed at 444 F.2d at 435, fn. 1);

2. *Stockton Daily Record*, N.L.R.B. Regional Director Decision (20th Region), 71 LRRM 1613 (1969);

3. *Pulitzer Publishing Company*, 146 NLRB 33, 55 LRRM 1287 (1964);

4. *N.L.R.B. v. Abell Co.*, 327 F.2d 1 (4th Cir. 1964).

Despite language contained in the Ninth Circuit's decision to the contrary, the facts in these fourteen "employee" cases are very similar to those in the matter which was decided by the Ninth Circuit. Thus, in all or almost all of the fourteen "employee" cases, the dealers were labeled independent contractors in the contract; their compensation mainly consisted of the difference between the wholesale and retail newspaper rates; they were not reimbursed for their expenses; they were not on the payroll; no social security, withholding tax or unemployment insurance deductions or payments were made for them; they received no fringe benefits such as overtime, pensions or health and welfare coverage; they hired drivers, delivery boys and substitutes; they owned their delivery vehicles and other equipment; they purchased supplies on their own; they often engaged in part-time work; they often sold other newspapers; they performed their own billing and collecting; and they determined their own customers and were responsible for losses. Indeed, these "independent contractor" indicia have become commonplace in the newspaper industry and dealership operations since 1960. Moreover, in all or almost all of the fourteen "employee" cases the Company established the size of the dealership and split or combined dealerships; it owned the proprietary interest in the dealership; it exercised certain controls over the resale rate although in several cases the dealer sold at other than the suggested or stated retail rate; it controlled the wholesale rate and often adjusted it to subsidize the dealer; it provided other subsidies and bonuses; it sold supplies to the dealers; it controlled pick-up and delivery times; it enlisted the dealer's help in promoting circulation; it employed dealers indefinitely and terminated them for poor performance; it required that the dealers post bond; and

it supervised the other details of the dealer's work to various extents.

The four "independent contractor" cases are distinguishable from the case decided by the Ninth Circuit. In three of these cases the dealer actually owned a business because he enjoyed a proprietary interest in the dealership and could sell or assign it.[8] In *none* of the four "independent contractor" cases did the Company supervise the dealer or exercise any control over the details of his work. (This Court should note that in other recent cases the Ninth Circuit has held that the test for "employee" status under Section 2(3) of the Act depends "primarily upon the amount of supervision that the putative employer has a right to exercise over the individual, particularly regarding the details of the work". *Associated Independent Owner-Operators, Inc. v. N.L.R.B.*, 407 F.2d 1383, 1384 (9th Cir. 1969); *Carnation Co. v. N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).)

The Ninth Circuit completely misapplied this relevant newspaper dealer case law and in addition its decision contains significant omissions and misstatements concerning the undisputed facts. Space precludes a full detailing of these distortions of the record. Yet a few examples should suffice to demonstrate the arbitrary manner in which the Court wrenched the facts to fit its conclusion. The Ninth Circuit omits the important facts that the dealers purchase the bulk of their supplies from the Company and that most of these are sold at below cost to the Company or are provided free of charge; that the Company subsidized each of the Marin County dealers by more than $100 per month in connection with the answering service; and that the Com-

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[8] *Stockton Daily Record, supra; Pulitzer Publishing Company, supra; Scripps Company as Publisher of the Cincinnati Post & Times Star, supra.*

pany telephones all subscribers with "aggravated" complaints to make certain that they have been properly resolved. Moreover, the Ninth Circuit seriously mischaracterizes other important facts by its incorrect assertion that apart from checking street racks, the supervisor "does not concern himself with daily delivery and service" (App. A. 5); by erroneously describing the Company's exhaustive program of complaint supervision as "lax" (App. A. 10); and by incorrectly stating that the Company generally "represents to its complaining customers that its hands are tied because the Dealers are independent businessmen" (App. A. 9).

Petitioners submit that the Board's decision, in the case decided by the Ninth Circuit, not only represents a "choice between two fairly conflicting views" within the meaning of this Court's decision in *N.L.R.B. v. United Insurance Co., supra.* Indeed, it represents the *only* possible view under the highly developed post-1960 newspaper dealer case law. The Ninth Circuit's action in overturning the Board's decision grossly exceeds the permissible bounds of judicial review.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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August, 1972.

APPENDIX A

United States Court of Appeals For The Ninth Circuit

DOUGLAS BROWN, WALTER DE LONG, PHILLIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, and WILLIS P. KOLB, *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent,* and SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC., *Intervenor,* and NEWSPAPER AND PERIODICAL DRIVERS' & HELPERS' UNION LOCAL 921, *Intervenor.*	No. 71-2767

[June 12, 1972]

On Petition for Review of a Decision and Order of The National Labor Relations Board

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Before: DUNIWAY, HUFSTEDLER and CHOY, Circuit Judges.

CHOY, Circuit Judge:

I. *Proceedings Below*

In September, 1965, the Hearst Corporation, which publishes the *San Francisco Examiner*, and the Chronicle Publishing Company, which publishes the *San Francisco Chron-*

icle, formed the San Francisco Newspaper Printing Company, Inc. (the Company) to operate certain business aspects of the two dailies and the *Sunday Examiner and Chronicle.* Until 1965, the Newspaper & Periodical Drivers and Helpers' Union, Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Union), dealt with each newspaper individually. In 1967, the Union entered into a collective bargaining agreement with the Company, which was amended by a 1968 Supplemental Agreement.

Section 1(a) and (b) of the Supplemental Agreement extended the Union's jurisdiction to the Company's employees in the San Francisco suburbs, and provided for the termination of contracts with individual newspaper dealers in certain areas according to a prescribed schedule. The Union's prior attempts to unionize these suburban newspaper dealers had met with little success, and the Supplemental Agreement provided, in effect, for cancellation or unionization at each dealer's option.

Thirty-seven dealers in Marin and Santa Clara counties were affected by the Supplemental Agreement. None of the dealers was covered by the union contract or the Supplemental Agreement. Five dealers (the Dealers) then filed unfair labor practice charges against the Company and the Union with the National Labor Relations Board, alleging that their prospective terminations pursuant to the Supplemental Agreement violated §8(e) of the National Labor Relations Act, 29 U.S.C. §158(e).[1] Identical charges were

[1] "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person, and any contract or agreement entered heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . ."

Unless otherwise noted, all references shall be to the Act itself and not to 29 U.S.C. §141 *et seq.*

filed by four more dealers during June and August, 1970. The Board's Regional Counsel authorized the issuance of a complaint against the Company and the Union, and the district court entered a temporary injunction pursuant to §10(1).

The trial examiner held that the Dealers were "employees" rather than "independent contractors," and were thus precluded from challenging the Supplemental Agreement. The Board, one member dissenting, accepted the recommendation that the complaint be dismissed. 194 N.L.R.B. No. 4 (1971). The Dealers immediately filed for judicial review under §10(f). The district court dissolved its injunction, and the Company terminated three more dealers. We expedited review, stayed the Board's order, and continued the restraining order until further notice. We reverse and remand for a hearing on the merits.

II. *Major Characteristics of the Dealership Relationship*

1. The contract. The Company provides a uniform printed contract which each dealer must sign. The Company agrees to sell papers to the dealer at the wholesale rate, to assist him upon request, and to provide customer lists to the extent they are available and not already furnished. It also covenants "[t]hat, notwithstanding anything to the contrary in this Agreement, it will not exercise any direction or control or right thereof over the manner, methods or means Dealer shall employ to perform this Agreement."

The dealer agrees to purchase enough papers adequately to service his customers, to post a bond, and to furnish the Company, on demand, with whatever records he keeps. He may not assign his rights under the contract. The dealer "shall not be entitled to receive any compensation, allowances or other payment from Printing Company." The Company disavows all liability for any losses, expenses,

damages, or injuries incurred in the dealer's business or caused by the dealer's agents or employees. Finally, the contract recites that "Dealer is engaged in an independent business and is an independent operator, contractor, merchant and/or distributor and not an employee of Printing Company."

2. Price and territory control. The Company sets the wholesale price at which it sells papers to the dealer, who sets his own retail price. The Company suggests a retail price, to which many but not all dealers adhere. While the dealer covenants not to sell papers outside his designated territory, the Company allows dealers to exchange customers or areas along the edges of their territories.

3. Delivery. The Company delivers papers to dropoff points designated by the dealer and instructs that daily papers must be delivered to customers by 6:30 a.m., the Sunday paper by 7:30 a.m. Individual dealers insist that the papers be delivered well before this deadline. Other than the delivery deadline and a requirement that papers be protected from the weather, the Company leaves the details of delivery to the dealer, who hires carriers and determines their number, method of pay, hours and duties.

The dealer has complete authority to and does refuse to deliver to customers, especially because of defaulted payments, inaccessible homes, or impassable roads.

4. Credits and subsidies. The Company ordinarily refuses to accept returned newspapers for credit. If a dealer's draw of papers exceeds his sales, he bears the loss. However, the Company does accept returns when it unilaterally increases or "stuffs" a dealer's draw. On Sundays, the Company provides a credit for returned papers in excess of eight percent of the dealer's draw when it unilaterally stuffs the draw.

During the fifty-three day strike in 1968, the Company allowed dealers to borrow up to $400, with interest at 6% per year on the unpaid balance. After the strike the Company granted subsidies provided dealers maintained their post-strike draw at pre-strike levels. The Company occasionally lowers its wholesale rate and provides a car allowance as an incentive for dealers in less lucrative areas.

5. Billing. The Company exercises no control over the method by which a dealer bills customers. Nor does the Company assist a dealer who turns defaulted bills over to a collection agency or to small claims court. The dealer has the sole, accurate list of the Company's customers.

6. Competing jobs and papers. The Company allows dealers to take or continue outside jobs and to sell and deliver competing newspapers.

7. Supervision. The Company maintains two circulation area supervisors in the Marin area, one of whom sees his dealers once a week for twenty to thirty minutes. Less than five minutes is devoted to business. The other supervisor sees his dealers less often and maintains no fixed schedule of meetings. Neither supervisor polices delivery, and aside from occasional comments about an empty street rack he happens to notice, does not concern himself with daily delivery and service. The supervisors make suggestions about methods of billing or rack placement, but these suggestions need not be taken.

8. Dealer's investment and profit. Each dealer rents a shack or garage. Many also maintain home business offices. They purchase newspaper racks, tying machines, recordophones, addressograph machines and plates and daily supplies, such as string, wax paper, and rubber bands from the Company or from other, less expensive sources. There is no requirement that a dealer purchase anything from the Company.

A dealer does not buy his dealership, the customer list, or good will.

A dealer's gross profit is the difference between the cost of newspapers to him and the price he sells them. Net profit is derived by deducting his costs of operation from his gross profit.

9. Complaints. The Company operates an answering service in Marin County to which every dealer must belong and contribute monthly. The service provides three copies of each customer complaint. The first goes to the dealer, who is required to collect his complaints periodically. If a complaint is "aggravated," persistent over two days, the area supervisor receives the second copy but makes no immediate effort to adjust the grievance. Instead, he inquires at his next meeting with the dealer if the complaint has been resolved. On the dealer's assurance that something has been done, the matter is closed. The third copy rests in the office files.

Customers often mail their complaints directly to the Company in San Francisco. Each complaint is referred to the dealer concerned, and the Company usually informs the customer that his dealer " . . . like all our dealers, is an independent contractor and not an employee of the company so our control over his methods of operation is somewhat limited."

III. *Employees or Independent Contractors*

The Act itself states that "[t]he term 'employee' . . . shall not include . . . any individual having the status of an independent contractor . . . " §2(3). Common law agency concepts distinguish an employee from an independent contractor. *NLRB v. United Insurance Company of America*, 390 U.S. 254, 256 (1968). The application of agency principles to the facts of a case is a proper subject for judicial

review, and we may affirm the Board's determination only if we can conscientiously say that it is supported by the record considered as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951). We cannot affirm where, as here, the Board in "[i]ts application of the law to the facts overlooked accepted principles of the law of agency and also failed to follow, distinguish, or overrule its own similar cases." *Carnation Company v. NLRB,* 429 F.2d 1130, 1134 (9th Cir. 1970); *The May Department Stores v. NLRB,* 454 F.2d 148 (9th Cir. 1972).

Since the facts in each case are largely determinative, the Board's rulings in comparable newspaper dealer cases are not uniform. However, the standards formulated by the Board in the cases in which it found dealers to be employees[2] clearly indicate that the Dealers here are independent contractors rather than employees.[3] The Board previously has emphasized three factors, each including various factual considerations: (1) the entrepreneurial as-

[2]The Board found newspaper dealers to be employers in *Beacon Journal Publishing Co.,* 188 N.L.R.B. No. 23, 76 LRRM 1228 (1971); *The Herald Co.,* 181 N.L.R.B. No. 62 (1970), enforced, 444 F.2d 430 (2nd Cir. 1971); *San Antonio Light Division, The Hearst Corp.,* 174 N.L.R.B. 934 (1969) *(San Antonio III); El Mundo, Inc.,* 167 N.L.R.B. 760 (1967); *News Syndicate Co., Inc.,* 164 N.L.R.B. 422 (1967); *San Antonio II,* 167 N.L.R.B. 689 (1967); *Brush-Moore Newspapers, Inc.,* 161 N.L.R.B. 1620 (1966), enforced, 413 F.2d 809 (6th Cir., 1969); *The Sacramento Union,* 160 N.L.R.B. 1515 (1966); *Eureka Newspapers, Inc.,* 154 N.L.R.B. 1181 (1965); *The Vindicator Printing Co.,* 146 N.L.R.B. 871 (1964); *A. S. Abell Co.,* 137 N.L.R.B. 238 (1962), enforcement denied, 327 F.2d 1 (4th Cir. 1964); *San Antonio I,* 130 N.L.R.B. 619 (1961), *Lindsay Newspapers, Inc.,* 130 N.L.R.B. 680 (1961), enforced as modified, 315 F.2d 709 (5th Cir. 1963); *Buffalo Courier-Express, Inc.,* 129 N.L.R.B. 932 (1960); and *P.G. Publishing Co.,* 114 N.L.R.B. 60 (1955).

[3]The Board found newspaper dealers to be independent contractors in *Stockton Daily Record,* 71 LRRM 1613 (Reg. Dir., 20th Reg., 1969); *The Pulitzer Publishing Co.,* 146 N.L.R.B. 302 (1964); *Carter Publications, Inc.,* 100 N.L.R.B. 599 (1952); *The Times Herald Printing Co.,* 94 N.L.R.B. 1785 (1951); and *The Kansas City Star Co.,* 76 N.L.R.B. 384 (1948).

pects of the dealer's business, including the "right to control," (2) the risk of loss and opportunity for profit, and (3) the dealer's proprietory interest in his dealership.[4] An analysis of this case in terms of these factors compels us to conclude that the Dealers are equivalent to "the independent businessman whose earnings are controlled by self-determined policies, personal investment, and expenditure, and market conditions." *Beacon Journal Publishing Co.,* 188 N.L.R.B. No. 23, 76 LRRM 1228, 1230 (1971).

A caveat is necessary. Many characteristics of the relationship between the Company and the Dealers are compatible with an employment, independent contractor, or franchise relationship. "Evidence of economic control is not necessarily proof of the kind of control that is relevant to a decision whether a person is a contractor or an employee." *Carnation Company, supra,* at 1134. Great importance may not be attached to the fact, as the trial examiner put it that "[t]he result to be accomplished is, of course, the circulation and sale of the Company's newspapers." Both the Company and the Dealers benefit from increased circulation and sales. The rapid adjustment of complaints and a desire to promote sales are mutual goals, whether the Dealers are employees, independent contractors, or franchisees.

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[4]Language identical or substantially identical to the following may be found in the trial examiner's decision in this case and in almost every Board decision.

"The result to be accomplished is, of course, the circulation and sale of the Employer's newspapers. In accomplishing this result, the dealers herein bear slight resemblance to the independent businessman whose earnings are controlled by self-determined policies and personal investment . . .

"Moreover, the dealers' risk of loss and capacity to draw upon personal initiative to increase their earnings are minimized to a significant extent by the Employer's practices and policies . . .

"Further, the dealers have no proprietary interest in their routes . . ." *El Mundo, Inc.* 167 N.L.R.B. 760, 761 (1967).

It is immaterial to the present inquiry that the Company wishes complaints to be adjusted or sales promoted. The means used and the respective controls in accomplishing these goals are, however, highly material to the ultimate determination of employee or contractor status.

1. Entrepreneurial aspects. The various entrepreneurial characteristics of the Dealer's operations and the lack of control which the Company exercises require a finding that the Dealers are independent contractors.

First, until this dispute arose, the Company itself considered the Dealers to be independent contractors. Its uniform contract specifically disavows any intention to control the details of the distribution process. It attempts to insulate the Company from any liability arising from the Dealer's operations, and explicity defines the relationship it creates as that of independent contractor. Moreover, the Company represents to its complaining customers that its hands are tied because the Dealers are independent businessmen. The contract, while not conclusive, is an important indication of the parties' conception of their relationship. And here, the Company has, in fact, insulated itself from tort liability. The occasional paper which finds its way through a picture window is entirely the dealer's responsibility.

Next, aside from the admonitions that the papers be dry and promptly delivered, precautions which the Dealers' self-interest compels, the Company maintains no control over the manner and means of distribution. The Dealers are free to deliver the papers however they please. After the papers are brought to dropoff points designated by the Dealers,[5] the Company is unconcerned with how delivery is made. Its

[5]Supervised dropoffs at points designated by the company were considered important in *San Antonio III, El Mundo, Vindicator Printing* and *Brush-Moore*. The Board ignored this factor here.

supervisors do not police the carriers; they have no idea who the carriers are. The weekly meetings between supervisors and dealers are perfunctory and overwhelmingly devoted to social amenities rather than to business.[6]

The Company's interest in customer complaints is equally superficial. Despite the elaborate ritual of reporting complaints in triplicate and of keeping useless logs and tally sheets, the Company actually leaves the adjustment of complaints, including "aggravated complaints," entirely in the Dealers' hands.

In addition, the Dealers possess the unquestioned power to refuse to deliver to any customer they choose. Having placed great weight upon this element in previous cases,[7] the Board cannot ignore it here. Finally, the Company allows the Dealers to take other jobs and to sell competing newspapers, factors which the Board previously emphasized but ignored in this case.[8]

2. Risk of loss and opportunity for profit. The risk of loss rests almost entirely upon the Dealers. They bear the loss of damaged, lost, or stolen papers, are liable for broken

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[6]The lax supervision offered by the Company is comparable to the independent contractor cases of *Stockton*, *Pulitzer*, *Abell* and *The Kansas City Star*. The control the Company exercises does not approach the daily policing of racks and deliveries in the employee cases of *Herald*, *San Antonio III*, *El Mundo*, and *Beacon Journal*, or the frequent dealer reports found in *San Antonio I and II* and *Vindicator Printing*.

[7]*See, e.g.*, *Brush-Moore*, *Beacon Journal*, *San Antonio I*, *Buffalo Courier-Express*, and *Eureka*, where the dealer-employees had to deliver to all customers, and *Carter*, *Abell*, *Stockton*, and *Pulitzer*, where the independent contractor-dealers had discretion to terminate customers and to refuse to deliver.

[8]The employees in *El Mundo*, *San Antonio I*, *Sacramento Union*, *Lindsay*, and *Brush-Moore* could not moonlight. The independent contractors in *Stockton* and *Abell* could. Nor could the employees in *El Mundo*, *News Syndicate*, *San Antonio I*, *Sacramento Union*, *Eureka*, *Lindsay*, and *Brush-Moore* sell competing papers. The Dealers here are free to do both.

windows, and suffer financially when a customer defaults on his bills. The dealer provides the sole investment for material, racks, and machines.

The Board has previously emphasized that employee-dealers may return unsold newspaper for credit. The Dealers here may do so only when the Company unilaterally increases their draw. The Sunday credit is conditional and limited. If the dealer over- or under-estimates his needs, he bears the consequences. The so-called strike subsidy was paid only after the strike terminated, and served to maintain newspaper circulation, not to assist dealers during the period in which they had no income. Similarly, the lower wholesale paper rate and car allowance are available only in hardship areas.

The Company does provide free promotional aids. However, the dealers need not take advantage of these aids. While the sample newspapers are free, the Dealer must distribute them at his own cost. While telephone and personal solicitors are paid by the Company, a dealer may bar solicitation in certain areas of his territory, and refuse to service any new customer thus acquired.

The placement and expansion of a dealer's system of street racks are on his own initiative. The dealer alone adjusts complaints. The continued patronage of his home customers rests upon his own efforts, not upon any assistance from the Company. While the Company may increase a draw to benefit from a major news story, the dealer is responsible for producing maximum sales within his territory.

Finally, the dealer himself determines his retail price,[9]

[9]Even if the Company's decision to surrender the power to set retail prices resulted from *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Board has always considered this power highly indicative of employee status, and all its employee-dealers lacked this power. The independent contractors in *Stockton* and *Pulitzer* did not.

making adjustments at his sole discretion for paperboys outside churches, handicapped vendors in bus depots, and volume sellers.

Thus, the Dealers' opportunities for profit are limited only by their own initiative and policies. The essential business decisions are made by the Dealers, not by the Company.

3. Proprietory interest. The Board concluded that the Dealers lacked a proprietory interest in their dealerships since they do not purchase goodwill or customer lists when they begin business, and may not assign their dealership. It ignored the personal investment each dealer makes in his dealership. All the Dealers own cars which are used in delivery. Many have purchased office machines for billing or tying machines for packaging. While the monetary outlay may be modest to some, an investment of more than a thousand dollars is a substantial outlay for these men.

Assuming *arguendo* that the Board is correct in concluding that the Dealers lack a proprietory interest in their dealerships, this factor is completely outweighed by the entrepreneurial aspects, risks of loss, and opportunities for profit discussed above. In sum, the Board's own decisions dictate the conclusion that the Dealers are independent businessmen.

While this newspaper case is one of first impression in this circuit, we have been guided in other employee-independent contractor cases by the Restatement of Agency 2d §220(2).[10] *See, e.g., The Carnation Company, supra; Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d

[10]§220(2) "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(Footnotes continued on following page)

1383, 1385 (9th Cir. 1969). A comparison of the factors here with the criteria of §220(2) reenforces our conclusion that the Dealers are independent contractors.

In *NLRB v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (5th Cir. 1963), the court listed seventeen factors which supported the Board's conclusion of employee status. Ten of the seventeen *Lindsay* factors were absent in *NLRB v. A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964), and the court declined to enforce the Board's employee finding. Only four of the seventeen *Lindsay* factors are present here (#1, 3, 6, and 17); and as in *Abell*, the Dealer makes essential business decisions.

In addition, those cases which agree with the Board's finding of employee status emphasize factors absent here. The court in *The Herald Co. v. NLRB*, 444 F.2d 430 (2nd Cir. 1971), noted that the record disclosed the company's substantial control over the dealer's immediate income and the ultimate value of his distributorship, plus extensive policing of delivery and compulsory participation in promotions. In *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 802 (6th Cir. 1969), the court found that the dealers

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"(b) whether or not the one employed is engaged in a distinct occupation or business;

"(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular operation;

"(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer;

"(i) whether or not the parties believe they are creating the relation of master and servant; and

"(j) whether the principal is or is not in business."

could not hold outside jobs or sell competing papers. The company exercised extensive control over the manner and means of delivery, and reduced the dealer's risks of loss through subsidies, mileage refunds, price variances, and credits for returns. In both these cases, control over the details of the distributorship were clearly in the newspaper's hands.

IV. *Conclusion*

We cannot conscientiously say that the Board was correct in finding the Dealers were employees. We hold that they are independent contractors. Therefore, we reverse and remand.

APPENDIX B

D—5611

194 NLRB No. 4 San Francisco, Calif.

UNITED STATES OF AMERICA

Before the

NATIONAL LABOR RELATIONS BOARD

NEWSPAPER & PERIODICAL DRIVERS' & HELPERS UNION LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA	
and	
SAN FRANCISCO NEWSPAPER PRINTING CO., INC.	
and	
DOUGLAS BROWN, an Individual	Case 20-CE-68
WALTER DE LONG, an Individual	Case 20-CE-69
PHILLIP T. WALKER, an Individual	Case 20-CE-70
MARVIN W. WEISSENSEE, an Individual	Case 20-CE-71
KENNETH C. WOLLMAN, an Individual	Case 20-CE-72
JOHN ROY CONWAY, an Individual	Case 20-CE-73
LEROY LESTER HOLBROOK, an Individual	Case-20-CE-74
DARRELL E. BAKER, an Individual	Case 20-CE-76
WILLIS P. KOLB, an Individual	Case 20-CE-77

DECISION AND ORDER

On April 27, 1971, Trial Examiner Herman Corenman issued his Decision in the above-entitled proceeding, finding that the Respondents had not engaged in unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in

the attached Trial Examiner's Decision. Thereafter briefs and exceptions were filed.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D.C.

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1]The Charging Parties' request for oral argument is hereby denied, as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2]Our dissenting colleague sets forth only those factors supporting an "independent contractor" finding. We, however, agree with the Trial Examiner, as fully detailed by him, that on balance the factors supporting an "employee" finding outweigh those supporting an "independent contractor" finding.

MEMBER KENNEDY, dissenting:

The complaint alleged that the Respondent Company and the Respondent Union violated Section 8(e) of the Act by entering into an agreement requiring the Company to cease doing business with certain newspaper dealers. The Trial Examiner found that the dealers were employees rather than independent contractors and, therefore, that Section 8(e) was not applicable. Accordingly, he recommended dismissing the complaint. My colleagues have adopted the Trial Examiner's findings and recommendations. I disagree. I would find that the dealers are independent contractors and remand the case to the Trial Examiner for a determination on the merits.

There is no dispute that in determining whether the dealers are employees or independent contractors we are to apply common-law agency tests.[3] As stated by the Board:[4]

> . . .[W]hen persons are alleged to be independent contractors, the determination requires the application of the "right of control" test. Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this determination depends on the facts of each case, and no one factor is dispositive.

The standard is more easily stated than applied.[5] Moreover, the "right of control" standard must not be mechan-

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[3] *N.L.R.B.* v. *United Insurance Co.*, 390 U.S. 254.

[4] *A. Paladini, Inc.*, 168 NLRB 952.

[5] Compare *N.L.R.B.* v. *A. S. Abell Co.*, 327 F.2d 1 (C.A. 4) (holding newspaper distributors were independent contractors), with *Herald Co.* v. *N.L.R.B.*, 444 F.2d 430 (C.A. 2) and *News-Journal Co.* v. *N.L.R.B.*, 444 F.2d 254 (C.A. 3) (holding newspaper distributors were employees).

ically applied.[6] "It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management" that determines whether an employee or independent contractor relationship exists.[7] And the Board has emphasized:[8]

> In this connection, one of the factors considered by the Board in deciding whether an individual is an independent contractor or an employee is his opportunity to make decisions which will affect his profits and loss.

With these standards in mind, I shall recapitulate the evidence which in my opinion establishes that the dealers are independent contractors. The written agreement between the Company and the newsdealers specifically provides:

> 3. *Covenant Against Control.* That, notwithstanding anything to the contrary in this Agreement, it will not exercise any direction or control or right thereof over the manner, methods or means Dealer shall employ to perform this Agreement.

The agreement also specifically defines the dealer's relationship to the Company as that of independent contractor.

Except for the requirement that the morning newspaper must be delivered by 6:30 a.m. and the Sunday paper by 7:30 a.m., the manner and method of delivering the newspaper is entirely within the discretion of the dealer. Thus, as found by the Trial Examiner:

> The method and manner of the hire of helpers [to deliver the newspaper], the number thereof and the payment to the helpers is entirely within the discretion of the Dealer, without consultation with or instructions from the Company and without notifying the Company concerning

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[6] *A. Paladini, Inc., supra.*
[7] *U.S. v. Silk*, 331 U.S. 704, 719.
[8] *A. Paladini, Inc., supra.*

the identity of the people employed by the Dealer. The Dealers are not required to deliver papers themselves, although most do, and they are free to determine their own hours of work consistent with their responsibilities.

The dealers have a reasonable discretion in determining to whom they will not deliver newspapers. The Company will not require the dealers to serve delinquent nonpaying customers, residences, or places which are inaccessible to vehicles, or on impassable streets, and the dealer's judgment in this regard is ordinarily respected by the Company.

One of the Company's circulation department supervisors, Carl Lischeske, meets with each of the dealers in his territory once a week for about 20 or 30 minutes. According to the Trial Examiner, these meetings were "devoted in the main to nonbusiness matters, such as sports, hobbies, investments, etc. . . ." Another area supervisor, George Theobold, meets with his dealers far less often than does Lischeske.

On a number of occasions the Company has notified dissatisfied customers that it was unable to be of assistance to them in a dispute with a dealer because of the fact that the dealer was an independent contractor.

The Company does not carry on its payroll any dealers or persons employed by the dealers in selling and distributing the newspapers, nor does it withhold or pay social security taxes, income tax, unemployment insurance, or any other payroll tax for or on behalf of the dealers or the persons employed by the latter. The dealers and their helpers do not receive any fringe benefits provided by the Company for its employees and they are not covered by the collective-bargaining contract between the Company and the Union.

The dealer purchases his newspapers from the Company for a price unilaterally fixed by the latter. But he may sell

the newspaper at any price he chooses, although in most cases he adheres to the resale price suggested by the Company. This right to determine resale price is in fact exercised by some of the dealers. (See footnote 2 of the Trial Examiner's Decision.) The dealer orders the number of papers he believes he can sell and must pay for all papers received. He may not return unsold papers for credit, unless the Company unilaterally increases the order. The dealer has full discretion in billing customers to whom he sells and distributes papers. If a customer defaults in payment, the dealer bears the loss. The dealer has sole discretion in determining how to collect overdue bills, whether to utilize collection agencies or sue in small claims court.

The dealer is responsible for any losses or expenses incurred in his business and for any losses, damages, or injuries to persons or property caused by the dealer or his helpers. He bears all losses resulting from theft of newspapers or vandalism to the news racks and other equipment used by the dealer in the operation of his business.

The dealer rents or leases a shed at his own expense where he receives the newspapers and prepares them for distribution. He also invests in newspaper racks, tying machines, wooden benches, etc., and a motor vehicle. He purchases at his own expense rubber bands, wax paper, string, and office equipment for billing. The dealer's investment in equipment, exclusive of an automobile in which to make deliveries and office equipment, is about $750.

Dealers work no prescribed number of hours; some devote more time than others to their work. Some dealers take fairly long vacations of 1 or 2 months, others take no vacation; this is a discretionary matter with the individual dealer. The sole requirement as far as the Company is concerned is that the dealer notify the Company of the

person taking his place during his absence. Some of the dealers also engage in other occupations, a fact well known to the Company.

It appears to me that in making his overall assessment of the relationship between the dealer and the Company, the Trial Examiner failed to give proper weight to the numerous enterpreneural aspects of that relationship. For example, he failed properly to appreciate the significance of the fact that dealers are not required to sell newspapers at the Company's suggested retail prices. This is a most unusual relinquishment of control for this industry and is strongly indicative of an independent contractor relationship. The other aspects of the relationship which I have described above also show that the Company exercises a light hand over its dealers and that the latter have broad discretion in pursuing their distribution function. That the dealers are in fact small businessmen whose income is essentially profit rather than wages is brought home most vividly, in my opinion, in the 6-month profit and loss statement of Dealer Leroy Holbrook included in the Trial Examiner's Decision. According to this statement, Holbrook's gross receipts for the 6 months ending June 1970 amounted to $50,249. During the same period his cost of purchases amounted to $31,787, leaving him with a gross profit of $18,462. His operating expenses for such items as delivery, taxes, office expense, postage, office rent, telephone, auto and truck expense, refunds, repairs to racks, supplies, etc., amounted to $11,293. Thus his net profit before depreciation was $7,169.

In my opinion the foregoing establishes that the dealer's relationship to the Company is that of independent contractor rather than that of employee.[9] I would so find.

Dated, Washington, D.C.

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Ralph E. Kennedy, Member
NATIONAL LABOR RELATIONS BOARD

[9]Cf. *U.S.* v. *Silk*, 331 U.S. 704; *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (C.A. 9); *Meyer Dairy, Inc.* v. *N.L.R.B.*, 429 F.2d 697 (C.A. 10). The cases of *Herald Co.* v. *N.L.R.B.*, *supra*, and *News-Journal Co.* v. *N.L.R.B.*, *supra*, in which the courts upheld the Board's findings that the newspaper deliverers there involved were employees and not independent contractors are readily distinguishable from the present case. In both these cases, the newspaper publishers exercised considerably more operational control over the deliverers than is true in this case.

TXD-(SF)-46-71
San Francisco, Calif.

UNITED STATES OF AMERICA
Before the
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

NEWSPAPER & PERIODICAL DRIVERS' & HELPERS UNION LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA; and SAN FRANCISCO NEWSPAPER PRINTING CO., INC.	
and	
DOUGLAS BROWN, an Individual	Case No. 20-CE-68
and	
WALTER DE LONG, an Individual	Case No. 20-CE-69
and	
PHILLIP T. WALKER, an Individual	Case No. 20-CE-70
and	
MARVIN W. WEISSENSEE, an Individual	Case No. 20-CE-71
and	
KENNETH C. WOLLMAN, an Individual	Case No. 20-CE-72
and	
JOHN ROY CONWAY, an Individual	Case No. 20-CE-73
and	
LEROY LESTER HOLBROOK, an Individual	Case No. 20-CE-74
and	
DARRELL E. BAKER, an Individual	Case No. 20-CE-76
and	
WILLIS P. KOLB, an Individual	Case No. 20-CE-77

JERROLD C. SCHAEFER, ESQ., for the General Counsel.

TIMOTHY H. FINE, ESQ., of San Francisco, Calif., for the Charging Parties.

COOPER, WHITE & COOPER, by R. BARRY CHURTON, ESQ., and DAVID L. BACON, ESQ., of San Francisco, Calif., for San Francisco Newspaper Printing Company, Inc.

BRUNDAGE, NEYHART, GRODIN & BERSON, by KENNETH N. SILBERT, ESQ., of San Francisco, Calif., for Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

TRIAL EXAMINER'S DECISION

Statement of the Case

HERMAN CORENMAN, Trial Examiner; This proceeding under Section 10(b) of the National Labor Relations Act, as amended, was heard at San Francisco, California, beginning on November 18, 1970, and on various dates thereafter in November and December and was concluded on December 18, 1970. The consolidated complaint, as issued on August 19, 1970, and as amended on September 24, 1970, was based on charges filed by the individuals named in the aforesaid caption as follows: charges in Cases Nos. 20-CE-68 through 20-CE-72 were filed on March 27, 1970; charges in Cases Nos. 20-CE-73 and 20-CE-74 were filed on June 4, 1970; and charges in Cases Nos. 20-CE-76 and 20-CE-77 were filed on August 24, 1970. Such charges were duly served on each of the Respondents. The consolidated complaint, as amended, alleges in substance that Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter called the Union, and San Francisco Newspaper Printing Co., Inc., hereinafter called the Company, violated Section 8(e) of

the National Labor Relations Act, as amended, herein called the Act, by entering into, reaffirming, maintaining, and giving effect to an agreement requiring the Company to cease doing business with the Charging Individuals and other similarly situated newspaper dealers.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The pleadings establish, and I find, that the Company is a Nevada corporation with its principal office and place of business in San Francisco, California, and is engaged in the business of newspaper printing in connection with which it performs the mechanical, circulation, advertising, accounting, credit and collection functions for the San Francisco Examiner Division of the Hearst Corporation, publishers of the San Francisco Examiner newspaper, and the Chronicle Publishing Company, publishers of the San Francisco Chronicle newspaper.

During the past year, the Company in the course and conduct of its business operations, received gross revenues in excess of $200,000.

During the past year, the Company in the course and conduct of its business operations, purchased and received paper and printing supplies valued in excess of $50,000 which were shipped to it directly from suppliers outside the State of California.

During the past year, the San Francisco Examiner and the San Francisco Chronicle have each held membership in and/or subscribed to interstate news services, have each published nationally syndicated features, and have each advertised nationally sold products.

On the basis of these admitted facts, I find that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union and the Company and/or its predecessors have had continuing collective-bargaining relations since 1937. The Company which began operations September 15, 1965, is owned equally by the Hearst Corporation and the Chronicle Publishing Company who continue to attend to the editorial functions of these two metropolitan daily newspapers. The Sunday newspaper is published jointly by the co-owners of the Company, and it is called the San Francisco Sunday Examiner and Chronicle.

The Charging Individuals in this proceeding are newspaper dealers, hereinafter called Dealers, who have distributed and continue to distribute the Chronicle and the Examiner pursuant to separate uniform written agreements with the Company, known as "Dealer Purchase and Sale Agreement." Each Dealer distributes the newspapers exclusively in a prescribed area or territory. Douglas Brown distributes the Chronicle in the "Corte Madera" territory in Marin County; Walter De Long, the Chronicle in the "East San Rafael" territory in Marin County; Phillip Walker, the Chronicle in the "South San Rafael" territory in Marin County; Marvin W. Weissensee, the Chronicle in the "Kentfield" territory in Marin County, prior to his

termination on September 1, 1970; Kenneth C. Wollman, the Chronicle in the "San Anselmo" territory in Marin County; John Roy Conway, the Chronicle in the territory known as "Central San Jose" and the Examiner in the territory known as the "San Jose Streets" in Santa Clara County; LeRoy Lester Holbrook, the Chronicle in the territory known as "West San Jose" in Santa Clara County from 1967 to July 1, 1970, when his dealership was terminated by the Company pursuant to its collective-bargaining agreement with the Union which is under attack in this case as violative of Section 8(e) of the Act; Darrell E. Baker, distributor of the Chronicle in the "Fairfax" territory in Marin County; and Willis P. Kolk, distributor of the Chronicle in the "San Rafael" territory in Marin County.

The Company and the Union entered into a renewal collective-bargaining agreement on April 25, 1967, effective by its terms from October 16, 1966 to and including December 15, 1968, which covered the wages, hours and working conditions of employees of the Company engaged in the sale and distribution of its product within a specified geographical area. On March 22, 1968, the Union and the Company entered into a "Supplemental Agreement," effective by its terms from February 25, 1968 to and including February 28, 1971, which incorporates the terms of the aforesaid agreement of April 25, 1967, except as amended in the Supplemental Agreement. The Supplemental Agreement includes, *inter alia*, the following provisions:

SECTION 1.

(a)

This Agreement, except as hereinafter otherwise provided, applies to all employees employed within the cities of San Francisco, South San Francisco, San Bruno, Millbrae, Burlingame, San Mateo, Foster City, Oakland,

Berkeley, Alameda, Albany, El Cerrito, San Leandro, Belmont, San Carlos, Pacifica, Castro Valley, San Lorenzo, Redwood City, Atherton, Menlo Park, and Hayward—including road-men operating within a radius of fifty (50) miles of San Francisco—whose work is to promote the sale of, distribution of and the collection for the Employers' product through the medium of carrier boys, news boys, news vendors and news stands, including those full time employees performing dispatching. Provided, nothing herein contained shall be construed to interfere with part time dispatchers as now employed.

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(b)

It is agreed that Section 1(a) be subject to modification in accordance with the following terms:

(1) The Union's jurisdiction shall be extended to include:

Morning Newspaper	Effective Date	Afternoon Newspaper
East Menlo Park		
East Palo Alto	4-1-68	
Palo Alto	7-1-68	
South Palo Alto	10-1-68	
Mountain View		
W. Mountain View	1-1-69	
Moffett Field		
Barron Park	4-1-69	
Los Altos		
No. Sunnyvale	7-1-69	
Sunnyvale	9-1-69	Sunnyvale
Santa Clara	1-1-70	Santa Clara
Cupertino	3-1-70	
W. San Jose	7-1-70	W. San Jose

Morning Newspaper	Effective Date	Afternoon Newspaper
Campbell	10-1-70	Santa Clara Streets
Monte Vista	1-1-71	
Central San Jose Corte Madera	3-1-71	Central San Jose
Almaden Kentfield	7-1-71	San Jose Streets
East San Jose* Foothills* San Anselmo	9-1-71	
Fairfax San Rafael	1-1-72	
East San Rafael	4-1-72	
South San Rafael	7-1-72	

*Milpitas and E. San Jose hills excluded

(2) The dealer in any one or all of the above designated cities whose contract is terminated in accordance with the above terms shall, at the Employer's option, be permitted to continue in the same territory as an employee working under Union jurisdiction and so long as he remains continuously employed in the same territory shall not be subject to replacement in accordance with the seniority provisions of Section 26 but in all other respects shall be subject to the terms of this Agreement.

The collective-bargaining agreement between the Union and the Company was subsequently modified in 1969 to change the dealership termination dates of certain dealerships, for assumption of union jurisdiction, namely the Chronicle Monte Vista dealership, the Examiner Monte

Vista and Central San Jose dealership and the Examiner West San Jose dealership.

It is clear that the Respondents have reaffirmed and given effect to the termination provisions of section 1(b) of their March 22, 1968 Supplemental Agreement, as modified. Thus, on March 1, 1970, Wray Chain, a dealer distributing the Chronicle in the Monte Vista territory of Santa Clara County, was terminated pursuant to section 1(b) of the collective-bargaining supplement, as modified for assumption of the Union's jurisdiction, and Holbrook was terminated as a Chronicle Dealer in West San Jose July 4, 1970, for inclusion in the Union's jurisdiction pursuant to the aforesaid supplement. Holbrook was retained by the Company as a district manager under the collective-bargaining agreement which required him to join the Union after 30 days. Further implementation of the dealerships' terminations under section 1(b) of the collective-bargaining supplement was discontinued pursuant to a temporary injunction under section 10(1) of the Act.

It is clear from the record that the March 22, 1968 Supplemental Agreement extending the Union's jurisdiction to the dealerships therein designated on future effective dates is a continuation of past successive agreements over the years in which the Company and/or its joint owners have gradually extended recognition to the Union over Dealers outside the metropolitan cities of Oakland and San Francisco and into the suburbs north, south, and east of the two metropolitan cities. It is established without dispute that it has been the practice, when the dealership was terminated to absorb the Dealer into the collective-bargaining unit where he was assigned the employee classification of "District Manager" or "Wholesaler" performing duties and undertaking similar responsibilities that he had practiced as a dealer in home delivery and street sales. All parties

agreed that for the purposes of this case the terminated Dealer who subsequently was covered by the collective-bargaining agreement thereby became an employee under the Union's jurisdiction and was compelled to become a member of the Union pursuant to the union-security clause in the collective-bargaining agreement.

B. The Issues

The issues are:

(a) Whether section 1(b) of the March 22, 1968 supplement to the collective-bargaining agreement and its reaffirmance and implementation violates Section 8(e) of the Act. The resolution of this issue is contingent upon the determination of two preliminary issues, namely, (1) whether the news dealers are employees or independent contractors. The parties agree that if the Dealers are employees, there can be no Section 8(e) violation. See, e.g., *Minnesota Milk Company* v. *N.L.R.B.*, 314 F.2d 761, 764 (C.A. 8 1963). However, if the Dealers are found to be independent contractors, the question is posed whether section 1(b) of the March 22, 1968 Supplemental Agreement has a primary work preservation objective so as to insulate it from a Section 8(e) violation.

C. Employee vs. Independent Contractor Status

The Company provides a uniform printed agreement for signature by the Dealers called a "Dealer Purchase and Sale Agreement." All Dealers who distribute the Chronicle and Examiner sign such an agreement and it purports to govern their relations. The current "Dealer Purchase and Sale Agreement" has been in effect since April 12, 1969, and differs in some respects from the previous agreement.[1]

[1]For example, the previous dealer agreement, effective February 1, 1967, required the Dealer to sell newspapers to subscribers at a

(Footnote continued on following page)

Relevant provisions of the agreement are in part as follows:

I. Printing Company agrees:

1. *Sales of Newspapers.* To sell the Dealer on each day of publication copies of the Chronicle and Sunday Examiner & Chronicle at the Wholesale Rate.

2. *Statements of Account.* To furnish Dealer with a statement of account for each Billing Period, including (but not limited to) the amount due Printing Company for copies of the Chronicle and the Sunday Examiner & Chronicle sold to Dealer.

3. *Covenant Against Control.* That, notwithstanding anything to the contrary in this Agreement, it will not exercise any direction or control or right thereof over the manner, methods or means Dealer shall employ to perform this Agreement.

4. *Assistance.* Upon request, to give Dealer advice and the benefit of its knowledge regarding subscriptions, service matters, deliveries or collections.

6. *Customers List.* To the extent available, and to the extent not already furnished, to furnish or cause to be furnished for the use of Dealer a list of names and addresses of Customers in Dealer's Territory.

II. Dealer agrees:

1. *Purchase of Newspapers.* To purchase at the Wholesale Rate and accept delivery from Printing Company on

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(Footnote continued from preceding page)

fixed retail rate, determined by the Company and to sell to authorized sales outlet customers at not to exceed the retail rate fixed by the Company. The elimination of these restrictive resale provisions from the April 12, 1969 agreement appears to have resulted from precautionary measures taken by the Company not to violate legal principles announced in *Albrecht* v. *The Herald Co.*, 390 U.S. 145 (1968).

each day of publication sufficient copies of the Chronicle and the Sunday Examiner & Chronicle to adequately serve and supply all Customers in Dealer's Territory.

2. *Sale and Deliveries.* To sell and deliver copies of the Chronicle and the Sunday Examiner & Chronicle to all Customers in Dealer's Territory and to make all sales and deliveries promptly and timely after copies are sold and delivered to Dealer.

3. *Payments.* To pay Printing Company within 15 days following the end of each Billing Period for all copies of the Chronicle and the Sunday Examiner & Chronicle delivered to the Dealer during such Billing Period, at the Wholesale Rate, in lawful money of the United States of America, at its address hereafter stated.

4. *Guaranty of Performance.* As a guaranty for Dealer's faithful performance of this Agreement:

(a) *Cash Deposit*—(Details not here set forth).

(b) *Surety Bond and Deposit*—(Details not here set forth).

5. *Records.* To keep up to date such records as are used by Dealer in Dealer's business and/or furnished or caused to be furnished to Dealer by Printing Company; and upon demand at any time, and from time to time, to supply to Printing Company from such records any information which Printing Company may request, including (but not limited to) a complete list of names and addresses of all Customers served by Dealer.

6. *Promotion of Circulation.* To make an earnest, conscientious and continuing effort to promote and increase the circulation of the Chronicle and the Sunday Examiner & Chronicle within Dealer's Territory.

7. *Substitute.* To furnish a temporary substitute acceptable to Printing Company at Dealer's expense whenever

such a substitute is necessary to perform Dealer's obligation under this Agreement.

9. *Other Territories.* Not to sell or deliver copies of the Chronicle or Sunday Examiner & Chronicle except within Dealer's Territory.

12. *Duties Upon Termination.* Upon termination of this Agreement:

(c) *Final Settlement of Accounts*—To pay to Printing Company within fifteen (15) days thereafter all amounts, then or thereafter due and payable from Dealer to Printing Company, according to the terms of this agreement, including (but not limited to) the purchase price, at Wholesale Rate, for all copies of the Chronicle and the sums of money collected in advance by Dealer from Customers served by Dealer.

III. Both Parties agree that:

1. *Allowances, etc.* Dealer shall not be entitled to receive any compensation, allowances or other payment from Printing Company.

2. *Independent Contractor Relationship.* Dealer is engaged in an independent business and is an independent operator, contractor, merchant and/or distributor and not an employee of Printing Company; Dealer personally hires and pays all persons assisting Dealer in the sale and distribution of the Chronicle and the Sunday Examiner & Chronicle and in the collection of money from Customers; and Dealer has sole and exclusive control over all of Dealer's agents and employees. Without being construed as limiting or derogating Dealer's status as an independent contractor, Dealer shall maintain adequate workmen's compensation insurance and furnish Printing Company with satisfactory evidence of such insurance; with reference to

motor vehicles used in the performance of Dealer's obligations hereunder, and all premises used by him in such performance, he shall maintain bodily injury liability insurance with limits not less than 100/200,000 and property damage liability insurance with limits of not less than 5,000. Such liability policy(ies) shall designate Printing Company as a co-assured and shall provide for not less than ten (10) days prior written notice to Printing Company before any cancellation of said policy(ies) become effective. Dealer shall furnish Printing Company with certificate(s) showing that such liability insurance is currently in effect with an insurer authorized to transact business in California.

3. *Dealer's Liabilities.* Printing Company shall not, in any event, be liable for the following and Dealer shall be solely liable therefor:

(a) Any losses or expenses incurred in Dealer's business;

(b) Any losses, damages and/or injuries to the person or property of Dealer, Dealer's agents or employees, Customers served by Dealer, and other persons, caused by or in any way connected with or attributable to any act or omission of Dealer or Dealer's agents or employees.

4. *Indemnity.* Dealer shall, under all circumstances, indemnify and hold Printing Company harmless from liability for any and all of the aforementioned expenses, losses, damages and/or injuries and for any and all losses, damages, expenses, and/or liabilities caused by Dealer's breach of or failure to properly perform any promise or condition herein contained.

5. *Substitute for Dealer.* If Dealer shall be unable at any time and for any reason to fulfill Dealer's obligations under this Agreement Printing Company, without terminating this Agreement or releasing Dealer from any of

Dealer's obligations hereunder and without notice to Dealer, shall have the right to cause such obligations to be performed by some other person at the expense of Dealer.

6. *Right to Terminate.* Either party may terminate this Agreement upon giving the other party, at the address hereafter stated, written notice of termination not less than thirty (30) days prior to the effective date of such termination, which date shall be specified in the notice; provided, however, that if Dealer at any time fails, refuses or becomes unable to fully perform any promise or condition hereof, Printing Company may terminate this Agreement upon written notice to Dealer, which notice shall be effective immediately.

11. *Assignment of Agreement.* This Agreement is not assignable nor transferable in whole or in part by Dealer, voluntarily, by operation of law or otherwise.

IV. Definitions: The following terms shall have the following meanings:

3. *Wholesale Rate:* The wholesale rate of the Chronicle and the Sunday Examiner & Chronicle as fixed and established from time to time by the publisher thereof.

4. *Territory.* The territory (established and defined from time to time by Printing Company) within which Dealer is authorized to sell and deliver copies of the Chronicle and Sunday Examiner & Chronicle.

5. *Billing Period.* The period fixed and established from time to time by Printing Company for periodic billing to Dealer which, unless otherwise fixed, shall be a calendar month.[1a]

[1a]The quote is from the agreement with Chronicle Dealers. The identical agreement is also made with Examiner Dealers relating to the Examiner distribution.

I find that the Company and the Dealers are substantially carrying out the terms of the Dealers' agreement, but by this finding make no conclusion on the independent contractor question of law.

In connection with the performance of the agreement, I make the following further findings of fact:

The Dealers are each allotted an exclusive territory in which to sell their newspapers to home subscribers and to retail outlets, such as liquor stores, drugstores, newsstands, etc., or through honor racks or coin operated racks. They are required to confine their sales to the restricted territory. The newspapers coming from San Francisco are dropped off daily by the Company's truck drivers at designated sheds or buildings leased by the Dealer at his own expense.

The Dealer purchases his newspapers from the Company for a price unilaterally fixed by the Company. Under the current contract in effect since April 12, 1969, the Dealer may sell the newspapers at any price he chooses, but in most cases he adheres to the resale price suggested by the Company.[2]

The Dealer is required by the Company to deliver the morning paper by 6:30 a.m., and the Sunday paper by 7:30 a.m. The average dealer distributes approximately 1,700 daily and 2,000 Sunday papers. The Dealer hires on the average four to six individuals to help in the handling, folding, and distribution of the papers. Dealers customarily hire adult drivers to deliver the papers to home sub-

[2]Dealer Weissensee notified his residential subscribers that effective October 1, 1969, subscription prices would be increased 25 cents per month above the suggested resale price. Dealer Walker sold the Sunday only paper for 25 cents per month above the suggested resale price to home subscribers. Dealer Nelson was selling the Chronicle from the racks at 15 cents per copy when the suggested retail price was 10 cents. Dealer Conway sells the daily paper at ½ cent under the suggested price because of competition from the San Jose Mercury and other newspapers.

scribers and other customers by motor vehicle and sometimes boys to fold the papers and carry them. The method and manner of the hire of helpers, the number thereof and the payment to the helpers is entirely within the discretion of the Dealer, without consultation with or instructions from the Company and without notifying the Company concerning the identity of the people employed by the Dealer. The Dealers are not required to deliver papers themselves, although most do, and they are free to determine their own hours of work consistent with their responsibilities. The Company does not carry on its payroll any Dealers or persons employed by the Dealers in selling and distributing the newspapers, nor does it withhold or pay social security taxes, income tax, unemployment insurance, or any other payroll tax for or on behalf of the Dealers or the persons engaged by them in handling, selling, or distributing the newspapers; nor do the Dealers or their helpers receive any fringe benefits such as health and welfare coverage, paid vacations, overtime compensation or pension or retirement benefits from the Company; nor are they covered by the collective-bargaining agreement between the Company and the Union.

The Dealer orders the number of papers he believes he can sell, but must pay for all papers received and may not return unsold papers for credit except in those instances where the Company unilaterally increases ("stuffs") the Dealer's "draw" because of a newsworthy event or other reason; in which case the Company will accept the return of unsold newspapers for credit; and to encourage the volume sale of Sunday papers, the Company will accept for credit return papers in excess of eight percent where it unilaterally increases the order.

Duration of Agreement

The Dealer Purchase and Sale Agreement is indefinite in duration, but either party may terminate the agreement on 30 days' written notice, and the Company reserves the right under the agreement's terms to terminate the Dealer "immediately . . . if Dealer at any time fails, refuses or becomes unable to fully perform any promise or condition set forth in the Agreement."[3]

Some of the Dealers engage in other occupations, a fact well known to the Company. For example, Walker for a time operated a small coffee shop and vending machine business; Weissensee engaged in the real estate business; Brown was a stamp and coin collector; Kolb a minister of a Jehovah's Witnesses Church; Holbrook an assistant manager of a trailer park; and some Dealers sold competing newspapers. Thus, Conway rents a newsstand at the Greyhound Bus Depot in San Jose where he sells competing newspapers such as the San Jose Mercury and News; and in the East San Jose territory Dealer Nelson sells the Los Angeles Times as well as the Chronicle. The Company had no objection to this outside employment as long as it did not interfere with the Dealer's responsibility to distribute the newspaper.

The Dealers have a reasonable discretion in determining to whom they will not deliver newspapers. The Company will not require the Dealer to serve delinquent nonpaying customers, or residences or places which are inaccessible to vehicles, or on impassable streets, and the Dealer's judgment in this regard is ordinarily respected by the Company.

The Company in addition to its headquarters office in San Francisco which houses, among other departments, its circulation department, also maintains circulation depart-

[3]The Company has in the past terminated Dealers for cause, namely delinquency in payment of the monthly bill and failure to get up in the morning to see that the papers are delivered.

ment branch offices in Corte Madera for its Marin County operations and in Mountain View for its Santa Clara County lower peninsula and East Bay operations. Carl Lischeske is the circulation area supervisor in the Corte Madera office and George Theobald the circulation area supervisor in the Mountain View office. These two supervisors are in turn under the direction of Louis Dubour, the suburban circulation manager, with offices at San Francisco who in turn is responsible to Mr. Hobson, the circulation director, who also headquarters in San Francisco. Prior to July 1, 1970, the Marin County Dealers together with the Company maintained an answering service at the Corte Madera office in Marin County. The Dealers each paid $35 a month toward the partial cost of operating the answering service, the Company paying the balance which represented approximately three-fourths of the cost. The Dealer was required to telephone the Company's answering service twice (8 and 10 o'clock) in the morning and once in the afternoon to receive messages or complaints. The exact times of these calls were logged by a clerk at the answering service and placed on a master list. Additionally, many complaints are made by customers to the Company's home office in San Francisco by phone or letter.

Lischeske usually meets each Dealer once a week at an agreed upon spot convenient to the Dealer.[4] These meetings would last about 20 to 30 minutes and would be devoted in the main to nonbusiness matters, such as sports, hobbies, investments, etc., and the balance of the time devoted to dealership problems, such as placement of new racks, whether racks are sufficiently supplied with newspapers, sales promotion tactics and with customers' aggravated complaints in which Lischeske confirmed that they had already been attended to by the Dealer who in most cases

[4]For example, he would meet Dealer Walker in Walker's coffee shop over a cup of coffee.

had received written notice of the complaint several days before the matter was broached by Lischeske. It appeared that in most cases the Dealer's judgment as to the disposition of the complaint was satisfactory to Lischeske. Mr. George Theobald, the area supervisor in San Mateo, Santa Clara and Alameda Counties, presently responsible for 27 dealerships, met with his Dealers far less often than Lischeske met with his Dealers, and Theobald had no fixed schedule of meetings with his Dealers. Both Lischeske and Theobald would also contact the Dealers by phone.

The Dealer's Investment

The Marin County Dealer's investment in his dealership consists of a number of newspaper racks, tying machines, wooden benches on which to stuff and fold the papers, rubber bands, wax paper and string and office equipment for billing, and a motor vehicle. The Company offers to sell news rack equipment and other essential supplies at or below its cost, but the Dealer is free to buy elsewhere. Wax paper to wrap the paper in rainy weather is sold to the Dealer at 33 percent below the Company's cost. The fair value of the Dealer's equipment on an average is approximately $750 exclusive of the motor vehicle used by the Dealer to make deliveries as well as office equipment; such as typewriter and addressograph equipment used by some Dealers.[5]

Preparation of Paper for Delivery

Preparatory to delivery, the paper is folded and tied and in rainy weather placed in wax bags to insure a dry paper to the home subscriber. Failures in preparation of the paper

[5]Dealer Conway who handles San Jose Street sales of the Chronicle and the Examiner testified he had 179 coin-operated racks valued at $5,600.

for delivery result in many customer complaints to San Francisco and the answering service.

Profit Method of Computing Dealer Income

The Dealer's gross profit from his dealership is the difference between the cost of the newspapers to him and the price he sells them to his customers who comprise essentially home subscribers, newsstands and customers who purchase from coin racks. The net profit is derived by deducting the Dealer's costs of operation from his gross profit, in the same manner as any self-employed businessman would compute his net profit.

Surety Bond

The Company bills the Dealer each month for the papers sold to the Dealer in the previous month. The Dealer is required to make payment in full by the fifteenth of the month and if he does not make payment by the twentieth the matter is turned over to the Surety Company and the Dealer is subject to termination for cause. Customarily, the Company requires that the Dealer post a surety bond in an amount equal to the dollar volume of newspapers purchased in a two-month period and as collateral for the surety bond the Dealer is also required to have on deposit with the Company a cash bond equal to approximately 25 percent of the surety bond.[6] The Company advances the premium on the surety bond and bills the Dealer semi-annually for the amount of the premium. In the monthly bill submitted to the Dealer the Company also includes the bill for supplies and equipment sold by the Company to the Dealer, such as news racks, wax, etc.

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[6]The Company pays the Dealer interest at 4½ percent for the amount of the cash bond.

Hours of Work

The Dealer works no prescribed number of hours, and some Dealers devote more time than others to their work. Representative of a Dealer's workday in Marin County is that described by Dealer Douglas Brown, although other Dealers testified they worked longer hours than Brown. Brown testified he rises at 2 o'clock in the morning and arrives at his newspaper shack at 2:30 a.m., where a truck-driver of the Company will drop off his morning papers. Brown checks his newspaper racks to ascertain if any of them have been broken into; he removes the previous day's papers from the news racks and is back at his shack when the truck arrives from San Francisco with his newspapers. Brown sees to it that his drivers are on the job, that they receive the correct number of newspapers and that his drivers get their instructions on "starts" and "stops." Brown then ties up what papers he must himself throw, loads his car and goes out and throws them. If Brown has any driver trouble or a driver oversleeps, in that case, according to Brown, "It is up to me to either throw his route or get him on the job." After Brown "throws his route," he returns to his shack, picks up the "finals" or "street copy" which he distributes to his newspaper racks and stores. Brown usually has some free time between 6:30 and 8 a.m., to take a nap. At 8 o'clock he picks up his messages from his code-a-phone and picks them up again at 10 a.m., and then takes care of any messages or complaints which have come in over the code-a-phone.[7] Brown, like most of the Dealers, considers his drivers, all of whom drive their own vehicles, as independent contractors. His drivers furnish and maintain their own car insurance and they are paid on a piece-rate basis by Brown according to the number of customers

[7]Prior to August 1, 1970, Brown and other Marin County Dealers called the Corte Madera answering service for their messages and complaints.

they throw. This payment is made by Brown and not by the Company. Brown testified that his workday in connection with newspaper delivery usually ends at 10 a.m., on weekdays and 11 a.m., on Sundays. Additionally, he must also attend to his office work, billing, collections and sales promotion.

The Rebellion of the Marin County Dealers

Prior to August 1, 1970, the Dealers in Marin County participated in the answering service conducted by the Company at its suburban office at Corte Madera in Marin County. Each Dealer was charged $35 per month by the Company toward the cost of the answering service and the Company contributed the balance of the cost. In the latter part of July 1970, many of the Marin County Dealers served notice on the Company that they were dropping out of the answering service effective August 1, 1970, to install their own individual answering service. The reasons given at the hearing in this case for this action by some of the Dealers was a desire to have 24-hour per day service rather than the 12-hour day answering service at the Corte Madera office; others ascribed a desire to have their messages confidential; while others testified that the Corte Madera answering service was not satisfactory and misdirected messages. The company management although obviously unhappy voiced no clear objection to the Dealers' intentions to withdraw from the Corte Madera answering service. There is also credible evidence in the record that the Dealers, who had formed an association of newspaper dealers were manifesting a purpose to achieve greater independence from company control by their withdrawal from the answering service.[8] Effective August 1, 1970, these Marin

[8]The aforesaid activity in opposition to company control appears to have had its inception in the antitrust litigation between the

(Footnote continued on following page)

County Dealers did in fact withdraw from the Company's answering service. Some installed code-a-phones in their homes or their sheds while others merely used their regular telephone. Thereafter, these Dealers refused to turn over their messages or complaints to Lischeske or to discuss business with Lischeske, as had been the custom, the Dealers taking the position that as independent contractors they were not subject in any manner to the control of the Company. Reacting to this conduct by the Dealers, Mr. Kenneth R. Hobson, the Company's circulation director, on July 31, 1970, addressed identical letters to these Dealers in which, among other things, he advised the Dealers that the Company required "that it have full, complete and current access to all information concerning complaints by subscribers, all new service starts, and all stops in service, whether permanent, indefinite or temporary." Hobson's letter further notified the Dealers that it was the obligation of each Dealer to furnish to the supervisor on a daily basis all such information. Hobson further recited in the letter that the Company required information as to the number of unsold Sunday newspapers and it further expected that each Dealer would meet with a supervisor at least once each week for the purpose of discussing those various matters incidental to the distribution of the Chronicle and the Sunday Examiner and Chronicle as was customary in the

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(Footnote continued from preceding page)

Company and a dealer named Wyman after the decision of the United States Supreme Court in *Albrecht* v. *The Herald Co.*, 390 U.S. 145 (1968), an antitrust case holding that a newspaper publisher may not fix the resale price of its newspaper by an independent newsdealer. Mr. John Arteseros, who was temporarily taking over Supervisor Lischeske's duties while he was on vacation leave, testified credibly that Dealer Douglas Brown told him on July 21, 1970, that the Dealers were all going to pull out from the answering service, giving as the reason: "Well, we are paying an attorney, and we have got to do what he says—you are exercising too much control over us."

past. Hobson further notified the Dealers that "any dealer who fails to observe the foregoing requirements or who shall depart in significant fashion from the established practices shall be subject to termination."

The Marin County Dealers persisted in refusing to meet with Supervisor Lischeske or to turn over their messages and complaints coming through their individual telephones or code-a-phones and persisted in refusing to permit the count of their Sunday returns or to meet with Lischeske to discuss business as had been their custom. Consequently, Mr. Louis F. Dubour, suburban circulation manager, under date of August 26, 1970, directed the following letter to each of the Dealers: "Pursuant to Article 3, paragraph 6, please be advised our contract with you is terminated effective October 1, 1970."[9] After receiving the August 26, 1970 termination notices, the Dealers were notified by the supervisors that the notice of termination would be rescinded if they would meet the requirements set forth in Mr. Hobson's letter of July 31, 1970. The Dealers subsequently having manifested a good-faith desire to comply with Hobson's July 31, letter, Hobson, under date of September 22, 1970, notified each of them in writing that the termination notice scheduled to be effective October 1, 1970, had been revoked, Hobson notifying them he was "satisfied that you are complying with the requirements of the Company." Hobson further cautioned the Dealers in his September 22 letter that their continuing relationship with the Company was dependent on their continuing compliance with well established company practices and procedures mentioned in earlier letters. In the latter part of August 1970, Lischeske

[9]This referred to the Dealer Purchase and Sale Agreement provision providing in part that "Either party may terminate this Agreement upon giving the other party written notice of termination not less than thirty (30) days prior to the effective date of such termination."

was given access to the Dealers' messages over their private phones or code-a-phones; they resumed their weekly meetings with him to discuss company matters as had been the previous practice; and they accounted for the Sunday returns.

The Lack of a Proprietary Interest in the Territory

Although the dealers purchase and own the equipment which they use in newspaper distribution, such as their motor vehicles, benches, newspaper racks, wax paper and miscellaneous supplies as well as their office equipment such as typewriter desks, files, addressograph, code-a-phone, etc., they have no ownership in the territory, goodwill or customer list, and a new dealer pays nothing for the customers. Moreover, the agreement is not assignable by the dealer. The old dealer, under the overall supervision of the Company's supervisor, turns over to the new dealer his customer lists. The new dealer is selected by the Company's managerial representative and it has been the practice of the new dealer to purchase from the old dealer the equipment consisting of news racks, tables, benches and supplies, customarily valued at approximately $750 by direct negotiations.

Temporary Absences

Some dealers take fairly long vacations of one or two months, whereas others take no vacation, and it has been a matter within the discretion of the dealer to absent himself temporarily without permission from the Company, the dealer merely being required to notify the office of the responsible person taking his place during his temporary absence.

Records

The Company does not keep a record of the Dealer's subscribers or customers but the Dealer is required to keep

such a list for the Company's information on request. The Company does not seek to know the identity of the persons who are engaged by the Dealer to assist him in delivering his papers either to home subscribers or to news vendors such as drugstores, liquor stores, etc. The Company's Corte Madera office under the supervision of Suburban Supervisor Lischeske keeps a daily log of the times that each Dealer phones in to that office to ascertain messages and complaints, and a daily log is kept of the starts and stops and of the number of complaints each day and each month for each Dealer, and a "derby" sheet is prepared by Supervisor Lischeske showing the comparative rank of each Dealer in volume of complaints per month. Lischeske will, in his meetings with the individual Dealers, relate to them how they rank on the derby sheet. Lischeske makes notations on his copy of the aggravated complaints the manner of their disposition after discussing with the Dealer.

Promotion

The Dealer is required under the terms of the contract to make an earnest, conscientious and continuing effort to promote and increase the circulation of the newspaper within the Dealer's territory. Assisting the Dealer in his promotional activities, the Company provides free sample newspapers or post cards at no cost to the Dealer to be distributed by the Dealer at his own cost, if any, to non-subscribers. Other means utilized by the Company to promote new customers is through a telephone solicitor maintained at the Company's expense who solicits new customers, and occasionally boy crews are used by the Company at its expense to personally solicit home subscribers. In this promotional campaign the Company respects the Dealers' wishes and accordingly will not solicit new customers in areas vetoed by the Dealer because of high risk credit and will leave it to the Dealers' discretion to reject new

subscribers who are poor credit risks. The Company further assists in promotion by giving premiums such as electric clocks to new subscribers and pays the Dealer a $1.50 bonus on new customers procured by the Dealer through the sample newspapers or post cards. The Company also conducts new subscriber contests among the Dealers and awards $100 prizes to the winners or trips to Las Vegas, etc.

New Subscribers

The Company's suburban office at Corte Madera follows up on new subscribers to verify if the newspaper has started delivery and if the customer is satisfied, and in cases of aggravated complaints coming in either to the answering service or to the San Francisco office, either the supervisor or one of the clerks under his supervision in the office will phone the customer to confirm whether the subscriber's complaint has been satisfactorily adjusted by the Dealer.

Risk of Loss

The Company does not reimburse the Dealer for any losses sustained by him through the inability to collect from the customer whether that customer is a home subscriber or a retailer and it is entirely in the discretion of the Dealer what means he uses to collect the bill, and on nonpaying customers collection is sought by the Dealer through collection agencies or through suit in the small claims court. Additionally, the Company assumes no liability for theft or damage to the news racks or other equipment owned and used by the Dealer in the operation of his business, and the Company does not intrude into the financial relationship between the Dealer and his helpers.

Independent Contractor Provisions of Agreement

The Dealer Purchase and Sale Agreement expressly provides that the Company will not exercise any direction

or control or right thereof over the manner, methods or means the Dealer shall employ to perform the agreement and the agreement also stipulates that the Dealer is engaged in an independent business and is an independent operator, contractor, merchant and distributor and not an employee of the Company. The evidence shows that on a number of occasions the Company has notified dissatisfied customers that it is unable to be of assistance to them in a dispute with a dealer because of the fact that he is an independent contractor. Thus, in response to a letter from Chronicle subscriber Zazzi, the Company's circulation director in a letter dated March 18, 1970, told here in part:

> Mr. Weissensee, like all our dealers, is an independent contractor and not an employee of this Company so control over his method of operation is somewhat limited. If at this time you still have not received the refund mentioned in your letter, our suggestion would be for you to go to the small claims court as you have indicated.

In a letter to a customer named Richard M. Pastarino dated March 4, 1969, the Company's suburban circulation manager said:

> The delivery of the Chronicle in your area is handled by a contracted independent dealer, a Mr. Charles Nelson. As such, there is only a limited amount of control we can exercise over his operation .... Presently Mr. Nelson is threatening small claims action. I cannot interfere with this threat because of our contractor relationship. I hope this action will be avoided by your payment of the bill.
>
> At that time we can ask Mr. Nelson to resume service, and also mail you a premium.

In a letter responding to correspondence from Mr. Jack A. Feller, Jr., dated October 24, 1969, the Company's suburban circulation manager replied:

The distributions and the collections of the San Francisco Chronicle in your area is handled by an independent dealer. Our control over a dealer is quite limited.

The Company through the testimony of management representatives Dubour and Hobson asserts that in a few cases this type of a letter is employed in the expectation that the Dealer is in a better position than they are to resolve the customer's grievance.

Aggravated Complaints

The Company has a system of recording all messages and complaints that come into the central office at San Francisco or the suburban offices at Corte Madera or Mountain View. All complaints which persist more than one day are arbitrarily classified as aggravated complaints. These are written up either at the central office in San Francisco or the suburban office as the case may be, copies thereof are delivered to the Dealer involved in the complaint and copies go to the supervisors, either Lischeske in Marin County or Theobald in Santa Clara County. At his weekly meetings with the individual Dealers in Marin County, Lischeske would take up each individual complaint to ascertain how it has been or will be resolved and to offer suggestions on its resolution. Typical of the aggravated complaints taken up by the suburban supervisor with the Dealers are such matters as: wet papers, late delivery, no delivery, delivery in improper place, improper start of delivery, disturbances by drivers, billing, or collection problems, failure to make newspaper inserts, newspaper routes, racks empty. At these weekly meetings, the supervisor discusses methods of increasing the newspaper draw and promotional techniques such as free newspaper samples, post card enclosures in newspapers and other methods of obtaining new subscriptions. Lischeske by his testimony concedes that he has regarded the newspaper dealers as independent

contractors and has dealt with them on that basis, namely in making suggestions, counseling and advising them rather than giving them orders. As I have stated heretofore, Lischeske's dealings with the individual dealers have been on a weekly basis and Theobald's dealings have been less frequent with the dealers under his supervision in Santa Clara County. Illustrative of the number of aggravated complaints registered in one month in Marin County is June 1970, in which month the Corte Madera answering service received 270 aggravated complaints regarding the Southern Marin County Dealers involved in this case. It has been the practice of the supervisor or his clerks in the answering service to contact the complaining subscriber to verify that the complaint has been attended to by the Dealer. The supervisor notes on the face of the aggravated complaint memorandum the disposition of the complaint after discussion with the Dealer.

Company Subsidies to Dealers

During the 53-day strike in January and February 1968, the Company made loans up to $400 to the Dealers upon request. With the termination of the strike, the Company granted subsidies to the Dealers averaging approximately $1,200 to $1,400 to each Dealer on condition that the Dealer maintain his daily draw of newspapers at a stipulated level in comparison with his daily draw before the strike. The subsidy was paid in equal installments to the Dealer for three consecutive months. The Company also assists certain Dealers to supplement their income in various ways. For example, Dealer Conway in San Jose is charged 1¾ cents less for the Examiner than the Chronicle because of the difficult competition the Examiner has with the San Jose newspapers and a further subsidy was granted to Conway of a car allowance of $400 per month. Additionally, Dealer

Baker is given "controlled" accounts where the Company's truck delivers the paper for Baker without cost to Baker.

Billing

The dealer takes full responsibility for billing the customers to whom he sells and distributes papers. Customarily, the home delivery subscribers are billed bimonthly, ordinarily one month in arrears and one month in advance. Some dealers use different methods than others, as the billing is within the dealer's own discretion. The customer usually pays by check through the mail, and in some cases the dealer authorizes a drugstore or some other retail location to receive payment from the subscribers. The dealer usually collects weekly from the retail distributors and gives them credit for any unsold papers. However, the dealer himself is not credited for unsold papers except in situations where the Company has "stuffed" the dealer's draw in which case the dealer, upon request, will receive credit for unsold papers as well as for the Sunday returns in excess of eight percent.

Insurance

The dealers are required to carry certain minimum limits of liability insurance on their motor vehicles naming the Company as the co-insured, and the dealer requires his helpers also to carry the minimum limits on their motor vehicles. The dealer also carries workmen's compensation insurance on his helpers, and at least one of the dealers treats his helpers as his employees rather than independent contractors making the usual payroll deductions for social security, etc.

Dealers' Business Premises

The dealer usually maintains his office at his residence and in many cases his wife or members of the family assist

him in keeping of office records such as customer account cards, billings and collections. The dealer rents or leases a shed or other premises at his own expense where he receives the newspapers and prepares them for distribution. The rent for the shed usually approximates $25 a month.

Dealers' Losses and Liabilities

Dealers are responsible for any losses or expenses incurred in their business and for any losses, damages or injuries to persons or property caused by the dealer or his helpers. Thus, in some cases the dealer has been responsible to reimburse home subscribers for the accidental breakage of a window. The dealer also absorbs all losses resulting from theft of newspapers or vandalism to their newspaper vending machines.

Dealers' Monetary Return

As has been stated heretofore, prior to the April 12, 1969, Dealer Purchase and Sale Agreement, the Company fixed both the wholesale rate to the dealer as well as the resale price to the customer from the dealer, but the April 12, 1969 agreement no longer fixed the resale price from the dealer to his customer. Notwithstanding the freedom granted to the dealers to fix their own resale price, the Company's suggested resale price in almost all cases has been adhered to by the dealers. Illustrative of the dollar volume of business transacted by the dealers and the method of computing gross and net profit is the profit and loss statement of Dealer Leroy Holbrook for the first six months of 1970 whose dealership was terminated July 1, 1970, pursuant to Section 1(b) of the Supplemental Agreement entered into March 22, 1968. This profit and loss statement prepared by Holbrook is as follows:

LEROY HOLBROOK
13 La Palmoa
Campbell, California
PROFIT & LOSS STATEMENT
JANUARY 1970 THRU JUNE 1970

Gross Receipts		$50,249.94
Purchases		$31,787.40
Gross Profit		$18,462.54
OPERATING EXPENSES:		
Contract Delivery	$8,881.20	
Taxes & Licenses	194.00	
Office Expense & Postage	410.53	
Office Rent	360.00	
Trash	17.50	
Telephone	50.00	
Auto & Truck Expense	644.69	
Refunds	433.16	
Repairs—Racks	102.47	
Phone Directory	10.50	
Supplies	75.05	
Repairs (Customer's Window)	10.27	
Insurance	103.70	
Total Operating Expenses		$11,293.07
Net Profit Before Depreciation Reserve		$ 7,169.47

Training

The Company does not regularly provide training for newspaper dealers or their helpers, and representatives of the Company do not accompany the newspaper dealers and their helpers when they are delivering papers and making collections but, so far as the evidence shows, new dealers engaged have had previous experience usually as an adult driver for another dealer and have not required training.

Changes in Dealership Territory

Although the Company has no plans in the foreseeable future to split the dealer territories in Marin County, because, as testified to by Lischeske, "my dealerships are all comparatively small," and "I would have to have a tremendous amount of building in Marin County for these dealerships to get to the size where they could be split," the record shows without dispute, according to the testimony of Suburban Circulation Manager Dubour, that dealership territories have in the past been combined or split by the Company to accomplish the Company's plan of operation.

Analysis and Conclusionary Findings

Section 2(3) of the National Labor Relations Act, as amended, provides that the term " 'employee' . . . shall not include . . . any individual having the status of an independent contractor . . . ."

In *N.L.R.B.* v. *United Insurance Co.*, 390 U.S. 254 (1968) in affirming the Board's conclusion that certain debit insurance agents were employees, the Supreme Court held that the common-law agency test should be applied in distinguishing an employee from an independent contractor.

The Board has frequently held that in determining the status of persons alleged to be independent contractors, the Act requires the application of the "right-of-control test." Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while on the other hand where control is reserved only as to the result sought, the relationship is that of independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative. While the rule is easier to state than to apply, I am satisfied on the entire record and upon over-

whelming Board authority that the Dealers are employees of the Company.[10]

While the Dealers possess numerous attributes indicative of independent contractor status, namely, that they are not carried on the Company's payroll; buy and sell their newspapers, hire and pay their own help, bear the risk of loss from nonpaying customers, do not work a fixed schedule or number of hours, do not work for wages, but compute their earnings as the difference between their dollar volume sales and the cost to them of the papers and other expenses incurred in the operation of the dealership, have an investment in newspaper distribution equipment, and office equipment and supplies, as well as an automobile; are not credited for unsold papers except where the draw is "stuffed" or for Sunday returns in excess of eight percent; are expressly designated independent contractors in the Company prepared dealership agreement; have not been restricted as to the resale price to the customer since April 12, 1969; these factors, however, are not uncommon in employment relationships in the newspaper industry, and are not decisive in the instant case when viewed in the light of factors evidencing the Company's control over the manner and means by which the result is to be accomplished.

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[10] *Beacon Journal Publishing Co.*, 188 NLRB No. 23 (1971), 76 LRRM 1228; *N.L.R.B.* v. *Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (C.A. 6 1969), enfg. 161 NLRB 1620 (1966); *San Antonio Light Division, The Hearst Corporation*, 174 NLRB No. 97 (1969), 70 LRRM 1252; *San Antonio Light Division, The Hearst Corporation*, 167 NLRB 689 (1967); *El Mundo, Inc.*, 167 NLRB 760 (1967); *The Sacramento Union, Inc.*, 160 NLRB 1515 (1966); *News Syndicate Co., Inc.*, 164 NLRB 422 (1967); *Eureka Newspapers, Inc.*, 154 NLRB 1181 (1965); *The Vindicator Printing Company*, 146 NLRB 871 (1964); *N.L.R.B.* v. *Lindsay Newspapers, Inc.*, 315 F.2d 709 (C.A. 5 1963), 52 LRRM 2780, enfg. 130 NLRB 680 (1961); *Buffalo Courier-Express, Inc.*, 129 NLRB 932 (1960); *San Antonio Light Division, Hearst Consolidated Publications, Inc.*, 130 NLRB 619 (1961); and *A. S. Abell Company*, 137 NLRB 238 (1962), enforcement denied, 327 F.2d 1 (C.A. 4 1964).

The result to be accomplished is, of course, the circulation and sale of the Company's newspapers. In accomplishing this result, the Dealer is not truly the equivalent of the independent businessman whose earnings are controlled by self-determined policies, personal investment and expenditure, and market conditions. The Dealer must purchase his newspapers at a wholesale price established by the Company, which the record shows, the Company at times reduces to individual dealers as a method of subsidizing them on low-paying routes as well as outright subsidies described heretofore; and although since the April 12, 1969 agreement, the resale price of the newspaper to the customer is not fixed, the record shows that in the main the Dealers adhere to the Company's suggested resale price. The Dealer's risk of loss and capacity to draw upon personal initiative to increase his earnings are minimized to a significant extent by the Company's practices and policies of preventing competition between Dealers by defining the territories in which they are limited to sell and by exercising the practice, in the Company's discretion, to split or combine dealership territories. Moreover, the Dealer has no proprietary interest in his territory or the customers. He is prohibited from assigning his dealership, and if he relinquishes his dealership, he does so without compensation except for such physical equipment the new Dealer selected by the Company is willing to purchase at a negotiated price.

The Dealer has no discretion in the matter but is required by the Company to post surety and cash bonds to insure his performance of financial obligations to the Company. He is required to carry liability insurance naming the Company as co-insured, and he is required to carry workmen's compensation insurance on his helpers.

The Dealer has no discretion in the matter but is required to keep up to date the records essential to the dealership,

such as customer lists, book accounts, customer messages and complaints, and from time to time to supply any of such information to the Company upon request. As a means of exercising control over the Dealers' contractual duty to promote and increase the newspapers' circulation, the Company's supervisors enlist the cooperation of the Dealer in the promotion campaigns described earlier in this decision to which the Company substantially contributes. Additionally, to insure good service and satisfied customers, the Company, through written communication from customers, the answering service, the documentation of complaints and messages, and the periodic meetings, as well as phone contacts between individual dealers and supervisors to ascertain and assure that the Dealer has attended to the customer message or complaint, thereby exercises important control over the manner and means of performance by the Dealer, and is an important device to monitor the Dealers' conduct of his dealership.

The Company's control over the manner and means of the Dealer's performance is further manifested by the requirement that the morning Chronicle be distributed no later than 6:30 a.m., and the Sunday paper no later than 7:30 a.m., and by the further Company requirement that the Dealer call in to the Company's suburban office at 8 and 10 a.m., and again before the office is closed for further customer messages and complaints. Additionally, the Dealer is required to fold the paper and to place in wax bags in rainy weather.

Over and above the manner and means of control above set forth is the ultimate power of the Company to terminate the Dealer on 30 days' notice, or immediately for cause.

The Company's control over the manner and means of the Dealer's job performance was emphatically demonstrated during the rebellion of the Dealers in Marin County

in the summer of 1970, when they refused to turn over their code-a-phone messages and complaints to Supervisor Lischeske, or to meet and discuss such complaints, messages, or any business matters with him. On this occasion, the Company clearly manifested its real control over the manner and means of the Dealers' job performance by serving them with written notice of their termination. When the Dealers capitulated to this action and resumed their past practices spelled out in Circulation Director Hobson's July 31, 1970 letter, the termination action was rescinded.

It is immaterial whether this control is exercised by means of suggestions and requests, rather than direct orders, and is directed towards "cooperative assistance" in the fulfillment of the dealer agreement. *Buffalo Courier-Express, Inc.,* 129 NLRB 932, 936 (1960); *Frito-Lay, Inc.,* 167 NLRB 73, 75 (1967); *The Vindicator Printing Co.,* 146 NLRB 871, 877, footnote 9 (1964).

Although the company prepared dealer agreement stipulates in express language that the Dealer is an independent contractor and not an employee of the Company and the Company covenants that it will not exercise any direction or control over the manner, method, or means the Dealer shall employ to perform the agreement, this language is not decisive in resolving the "independent contractor" versus "employee" issue in Board proceedings. See, for example, *Eureka Newspapers, Inc.,* 154 NLRB 1181, 1184 (1965); *The Sacramento Union,* 160 NLRB 1515, 1517 (1966); *News Syndicate Co., Inc.,* 164 NLRB 422, 424 (1967); *The News-Journal Co.,* 180 NLRB No. 137 (1970); *Frito-Lay, Inc.,* 167 NLRB 73, 74 (1967); *The Vindicator Printing Company,* 146 NLRB 871, 875 (1964).

As I have found that the Dealers are "employees" within the meaning of Section 2(3) of the Act, I conclude that a violation of Section 8(e) cannot be established, and the

Section 8(e) violation alleged in the complaint must fall. The conduct between an employer and his employees does not fall within the amit of Section 8(e) of the Act. *Minnesota Milk Company,* 133 NLRB 1314 (1961), enfd. *Minnesota Milk Company* v. *N.L.R.B.,* 314 F.2d 761, 764 (C.A. 8 1963) where the Court said at page 764:

> We adopt the Board's finding that Hillyer was an employee of the petitioner and not an independent contractor. In view of the well recognized rule that Section 8(e) of the Act does not control relationships between an employer and his employees, we hold that the union's action in requiring the petitioner to terminate the relationship which existed between it and Hillyer prior to June 9th when he began working under the labor agreement, was not violative of Section 8(e).

Upon the basis of the foregoing findings of fact and the entire record, I hereby make the following:

Conclusions of Law

1. The Respondent, San Francisco Newspaper Printing Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Newspaper & Periodical Drivers' & Helpers Union Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Dealers whom the Company and the Union, in their March 22, 1968 supplemental collective-bargaining agreement, have agreed to terminate on certain specified dates as alleged in the complaint are employees and not independent contractors within the meaning of Section 2(3) of the Act.

4. The March 22, 1968 supplemental collective-bargaining agreement referred to above is not an agreement "to cease doing business with any other person" within the meaning of Section 8(e) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, it is recommended that the Board issue an order dismissing the complaint in its entirety.

Dated:

HERMAN CORENMAN
Herman Corenman
Trial Examiner

APPENDIX C

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

Sec. 2(3) The term "employee" . . . shall not include . . . any individual having the status of an independent contractor . . . .

Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .